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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

PATRICIA K. LASHWAY, DIRECTOR OF RESIDENTIAL CARE SERVICES, WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, IN HER INDIVIDUAL CAPACITY, ET AL.,

Petitioners,

v.

CAREPARTNERS, LLC, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT M. MCKENNA
Attorney General

William Berggren Collins
Deputy Solicitor General
Counsel of Record

Michael P. Lynch
Senior Counsel

D. Thomas Wendel
Assistant Attorney General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245

QUESTIONS PRESENTED

1. Should a plaintiff seeking damages for First Amendment retaliation under 42 U.S.C. § 1983 for enforcement of fire safety regulations in an adult assisted-living facility be required to plead and prove the absence of probable cause, as required in prosecutorial retaliation under this Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), in order to accommodate and avoid undermining the important interest in the safety of residents of those facilities?

2. In denying qualified immunity on a First Amendment claim of regulatory retaliation, did the Ninth Circuit err in concluding the law was clearly established in 2003 that no accommodation should be afforded to the government's important interest in enforcing compliance with safety standards by a closely regulated business when the federal courts are still divided over whether and how to accommodate the government's interests in this context?

PARTIES

Petitioners:

Patricia K. Lashway, Director of Residential Care Services for the Washington State Department of Social and Health Services (DSHS), in her individual capacity;

Nancy Tyson, Boarding Home Enforcement Officer for Residential Care Services and Aging Adult Services for DSHS, in her individual capacity;

Joyce Stockwell, an employee of DSHS, in her individual capacity;

Robert (Bob) McClintock, Regional Administrator for DSHS, in his individual capacity;

Julie Lord, Licensing Field Manager for Residential Care Services for DSHS, in her individual capacity;

Kathryn Webb, Lead Field Inspector for Residential Care Services for DSHS, in her individual capacity;

Mary Corso, formerly the State Fire Marshal for the State of Washington, in her individual capacity;

Roger Woodside, Assistant State Fire Marshal for the State of Washington, in his individual capacity;

Ed Borgatti, Chief Deputy State Fire Marshal for the State of Washington, in his individual capacity, and

Michael Sturgeon, Deputy State Fire Marshal for the State of Washington, in his individual capacity.

Respondents:

CarePartners, LLC;

CarePartners Management, limited liability corporations under the Laws of the State of Washington, d/b/a Alderwood Assisted Living;

Joseph and Laura Kilkelly, owners of CarePartners, LLC, individually and on behalf of their marital community.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Patricia K. Lashway and the other petitioners, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 545 F.3d 867 (App. 1a). The court of appeals' order denying a timely petition for rehearing en banc is unpublished. (App. 67Aa). The United States District Court for the Western District of Washington's Order Granting In Part And Denying In Part Defendants' Motion For Summary Judgment is unpublished (App. 34a). The district court's Order Granting Defendants' Motion For Reconsideration is unpublished (App. 70a).

JURISDICTION

The judgment of the court of appeals was entered on September 25, 2008. A timely petition for rehearing en banc was denied on November 10, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional provisions are set out in the appendix at pages 73a–75a. The statutes and rules governing the regulation of boarding homes are at pages 76a–88a and 94a–103a respectively. The statutes and rules establishing fire safety standards are at 89a–93a.

STATEMENT

Respondent CarePartners, LLC, is owned by Joseph and Laura Kilkelly. CarePartners operates boarding homes in the state of Washington. Respondents are ten state employees. Six of them work for the state Department of Social and Health Services (DSHS). Four of them work for the state Fire Marshal.

DSHS suspended and revoked the license of one of the boarding homes operated by CarePartners, Alderwood Assisted Living, because it refused to comply with state fire safety standards prior to the enforcement action by the defendants. The standards prohibit a boarding home from having more than two semi-ambulatory or nonambulatory residents—living on the first floor—if it does not have an automatic fire suppression sprinkler system. DSHS determined that Alderwood had forty-six residents who were not ambulatory and that Alderwood did not have a sprinkler system.

CarePartners does not challenge the authority of DSHS to require sprinkler systems. It alleges, however, that DSHS's action was not undertaken because the boarding home was out of compliance with fire safety standards. Rather, it claims that the action was taken in retaliation for Mr. Kilkelly's exercise of his First Amendment rights. The Ninth Circuit held that the petitioners were not entitled to qualified immunity with regard to CarePartners' retaliation claim.

1. Regulation Of Boarding Homes To Protect Semi-Ambulatory And Nonambulatory Residents From Fire

DSHS licenses boarding homes. Wash. Rev. Code §§ 18.20.030–.050 (2002) (App. 78–80a). A boarding home is a "home or other institution . . . maintained for the express or implied purpose of providing board and domiciliary care to seven or more residents after July 1, 2000." Wash. Rev. Code §18.20.020(1) (2003) (App. 76a–77a). As part of the licensing function, DSHS is authorized to adopt rules setting standards for boarding homes, to conduct inspections to determine compliance with those standards, and to enforce those standards. Wash. Rev. Code § 18.20.090 (2002) (App. 81a); Wash. Rev. Code §§ 18.20.110, .190 (2003) (App. 81a–82a, 84a–87a). Enforcement may include imposing conditions on a license, imposing civil penalties, suspending or revoking a license, or refusing to renew a license. Wash. Rev. Code § 18.20.190(2)(b)–(d) (2003) (App. 85a). The modification, suspension, or revocation of a license is subject to review under the Washington Administrative Procedure Act, Wash. Rev. Code 34.05. Wash. Rev. Code § 18.20.190(5) (2003) (App. 86a–87a).

The State Fire Marshal has the "authority to enter upon all premises and into all buildings except private dwellings for the purpose of inspection to ascertain if any fire hazard exists, and to require conformance with minimum standards for the prevention of fire[.]" Wash. Rev. Code § 48.48.040(1) (2002) (App. 89a).

In 1998, Washington State suffered a fire in a boarding home that did not have an automatic sprinkler system. Eight residents died and many more were seriously injured. This tragedy brought this issue of fire safety in boarding homes center stage.

The Fire Marshal is responsible for establishing fire protection standards for boarding homes. Wash. Rev. Code § 18.20.130 (2002) (App. 82a–84a). Under DSHS rules, a boarding home shall

> "accept and retain an individual as a resident only when [the] individual is *ambulatory* unless the boarding home is approved by the *Washington state director of fire protection* to care for *semi-ambulatory* or *nonambulatory* residents[.]" Wash. Admin. Code 388-78A--240(3)(a) (2003) (emphasis added) (App. 101a).

DSHS and the Fire Marshal have adopted rules defining the terms "ambulatory," "nonambulatory," and "semi-ambulatory." Wash. Admin. Code 212-12-005(5), (22). (App. 91a–92a); Wash. Admin. Code 388-78A-010 (2003) (App. 94a–96a). A person is ambulatory if he or she can walk to safety without the physical assistance of another individual. Semi-ambulatory or nonambulatory individuals require the assistance of another individual to reach safety.

The Fire Marshal adopted rules requiring boarding homes to meet the fire safety standards in the state Building Code. Wash. Admin. Code 212-12--010(1)(d), (3)(a) (2003) (App. 92a). The safety standards define "evacuation capability" as "the ability of the clients of a licensed care facility to

respond to an emergency situation and either evacuate a building or move to a point of safety." Wash. Admin. Code 51-40-0313.4.1 (2003) (App. 90a). The standards divide residents into three classes. Class I is ambulatory; Class II is semi-ambulatory; Class III is nonambulatory. Facilities less than three stories in height are required to have a sprinkler system, if they have more than two semi-ambulatory or nonambulatory residents. The regulation requires:

> "An automatic sprinkler system shall be installed throughout every licensed care facility three or more stories in height or licensed for more than 16 clients. Licensed care facilities with 16 or fewer clients, *licensed to provide care for more than two clients* who have an evacuation *capability of II [semi-ambulatory] or III [nonambulatory], shall be provided* with an automatic *sprinkler system* throughout the facility." Wash. Admin. Code 51-40-0313.8.2.1 (2003) (emphasis added) (App. 90a–91a).

Under the building code, existing licensed occupancies may be exempted only if "such continued use is not dangerous to life and is acceptable to the local fire and building officials having jurisdiction." Wash. Admin. Code 212-12-010(4)(c) (2003) (App. 93a).

The Washington Legislature recognized the cost of installing sprinkler systems in existing facilities. In 1999, prior to the adoption of rules mandating sprinklers, the Legislature established a grant program to encourage and help pay for the cost

of installing sprinkler systems. 1999 Wash. Sess. Laws page nos. 2017–18 (ch. 379, § 503). The Legislature appropriated additional funds for this purpose in 2001. 2001 Wash. Sess. Laws page nos. 2089–90 (2d Spec. Sess., ch. 8, § 503). This program was productive. As of July 2003, of the over 500 boarding homes in the state, only forty did not have automatic sprinkler systems.

2. Suspension And Revocation Of Alderwood's Boarding Home License For Failure To Comply With Fire Safety Standards

On February 26–27, 2003, the State Department of Social and Health Services (DSHS) conducted an annual unannounced inspection of Alderwood Assisted Living, a boarding home operated by CarePartners. In the course of the inspection, the administrator of the home mentioned that the facility had eleven semi-ambulatory residents on the second floor. The residents list showed that thirty-six of the forty-nine residents had mobility issues. This raised a concern, because Alderwood did not have an automatic sprinkler system. However, DSHS did not cite the lack of a sprinkler system as a deficiency to be corrected.

On February 2, an official from the Fire Marshal's Office inspected Wenatchee Assisted Living, another boarding home operated by CarePartners. Wenatchee had no sprinkler system. The fire marshal observed a number of residents in wheel chairs and concluded that they were not ambulatory. Based on these observations, a violation was issued.

In March 2003, Mr. Kilkelly claimed that residents on the second floor of Alderwood were all ambulatory, but did not provide any supporting records or information. He wrote to the Fire Marshal's Office and stated that the violation was improper. He disputed the fire marshal's interpretation of the fire safety standards and argued that a fire marshal was not qualified to determine whether the residents were ambulatory. The Fire Marshal's Office took no further action on the violation at Wenatchee and forwarded the information to DSHS.

In the ensuing months, DSHS and the Fire Marshal Official's discussed the best way to enforce the sprinkler requirement. The two agencies agreed to conduct a joint inspection. DSHS was in the best position to determine whether the residents were ambulatory, and the Fire Marshal's Office would evaluate the fire safety standards. On June 23–24, 2003, the joint inspection of Alderwood and Wenatchee was conducted by teams which included registered nurses to evaluate the ambulatory status of the residents.

During the inspection, the nurses interviewed the residents and staff, and reviewed medical records related to the ambulatory and evacuation abilities of the residents. At Alderwood, DSHS determined that forty-six out of the fifty-two residents were not fully ambulatory. Review of the records revealed that thirty-one of the thirty-eight Medicaid residents were designated semi-ambulatory or nonambulatory. Alderwood's own records listed thirty-seven of the fifty-two residents as needing evacuation assistance. At Wenatchee, DSHS determined that twelve of the

forty-eight residents were not fully ambulatory. There were also serious deficiencies in Alderwood's and Wenatchee's fire policies and procedure, including a "defend in place" fire policy that required residents to remain in their rooms during a fire instead of evacuating the building. This policy was not correct for a nonsprinklered building.

On June 27, DSHS imposed conditions on the licenses of Alderwood and Wenatchee. DSHS did not require either facility to install a sprinkler system. However, it did require that the boarding homes come into compliance with the fire safety standards and have no more than two semi-ambulatory or nonambulatory residents if the facilities did not have a sprinkler system. DSHS also required special fire precautions while Alderwood and Wenatchee were coming into compliance. The conditions required:

- discharge all but two semi-ambulatory or nonambulatory residents (who must reside on the ground floor) within thirty days;
- within twenty-four hours, hire staff for the sole duty of conducting a fire watch seven days a week, twenty-four hours a day;
- within twenty-four hours, contact local fire chief to discuss level of risk to residents and how to evacuate in the event of fire;
- within seven days, train staff and residents on evacuation plans in the event of fire.

The facilities were required to submit a plan of correction within ten days about how deficiencies would be corrected. The conditions were subject to administrative appeal under the state

Administrative Procedure Act. However, such an appeal would not postpone the effective date of the conditions.

On July 2, 2003, CarePartners filed an administrative appeal of the conditions imposed on Alderwood and Wenatchee by DSHS. The appeal disputed DSHS's conclusion that residents of Alderwood and Wenatchee were not ambulatory and argued that the conditions were improper and unnecessary.

After it issued the conditions on the licenses, DSHS monitored compliance. As of July 9, Alderwood had taken no steps to relocate the semi-ambulatory and nonambulatory residents. As a result, on July 11, DSHS employees went to Alderwood to begin the process of relocating the residents. As of July 9, Alderwood also had not taken any steps to have a dedicated fire watch. Employees on staff were conducting a fire watch in addition to their other duties. Alderwood had taken some steps to update its evacuation plan and train its employees.

In contrast to Alderwood, when the administrator at Wenatchee learned of the conditions imposed on the facility, he gave notices of discharge to the semi-ambulatory and nonambulatory residents.[1] Wenatchee also instituted a fire watch. Initially, the fire watch did not comply with the order

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[1] Employees in charge of Wenatchee did not learn of the June 27, 2003, order imposing conditions on the license until July 9, 2003. The letter imposing the conditions was sent to Mr. Kilkelly, who did not forward it to Wenatchee.

because it was done by staff with other duties. However, by July 11, it complied with the condition because staff members rotated on and off fire watch; but while they were on fire watch, it was their sole responsibility, and it was conducted seven days a week, twenty-four hours a day. Subsequently, Wenatchee discharged nine of the semi-ambulatory and nonambulatory residents (one died), leaving only two. This brought the facility into compliance with the fire safety standards. Wenatchee also installed a sprinkler system about ninety days after DSHS's June 27, 2003, order.

On July 2, when CarePartners filed its administrative appeals, their attorney, Thomas Grimm, sought a meeting with DSHS to get the conditions lifted. He told DSHS's attorney, Catherine Hoover, that it would take some time to install a sprinkler system, asked to move all of the semi-ambulatory and nonambulatory residents to the first floor rather than discharging them, and claimed that a dedicated fire watch was neither practical nor needed. He wanted the license conditions lifted for approximately six months, until sprinklers could be installed. Ms. Hoover responded that there was no need for a meeting as safety issues were nonnegotiable. She also questioned whether moving all the semi-ambulatory and nonambulatory residents to the ground floor would increase safety because it would be difficult for two caregivers to assist forty residents to evacuate in the event of a fire.

Another attorney for CarePartners, Robin Dale, also called Ms. Hoover to arrange a meeting. Mr. Dale stated in his affidavit that he got the

impression from Ms. Hoover that Mr. Kilkelly was not one of DSHS's favorite people. She said he was "known" to DSHS, and Mr. Dale's impression of the way the term was inflected was extremely negative. Mr. Dale also stated that Ms. Hoover told him that the Director of Residential Care Services was "quickly losing patience" with Mr. Kilkelly.

A meeting was held July 10, at which time Mr. Kilkelly presented a plan of correction.[2] While some items on the statement of deficiencies were addressed, the plan did not include discharging any residents and Mr. Kilkelly indicated that he was in the process of obtaining bids for a sprinkler system. He told DSHS that it would take from three to six months to install a sprinkler system and that relocating residents would force Alderwood to close. After the meeting, DSHS refused to modify the conditions requiring a dedicated fire watch and the relocation of the semi-ambulatory and nonambulatory residents.

Considering CarePartners' failure to comply with conditions of the June 27, 2003, order for Alderwood, DSHS concluded that Mr. Kilkelly did not intend to meet the conditions. On July 11, DSHS issued an order suspending and revoking Alderwood's boarding home license. At this point, Mr. Kilkelly criticized DSHS in the media, and a number of the residents expressed their distress at having to move.

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[2] On July 11, 2003, Mr. Kilkelly had a meeting with regional DSHS officials about Wenatchee.

On July 14, CarePartners moved for a stay of the license suspension in superior court. The trial court issued a ten-day stay while it considered the matter and encouraged the parties to try and work out their differences.

On July 18, there was another meeting. DSHS offered to eliminate the requirement that the semi-ambulatory and nonambulatory residents be relocated, if Alderwood agreed to install a sprinkler system within ninety days. This was a major concession on the part of DSHS, because Mr. Kilkelly had stated that Alderwood would have to close if the semi-ambulatory and nonambulatory residents were relocated. DSHS required that the semi-ambulatory and nonambulatory residents be moved to the first floor by July 27. To protect these residents, DSHS also required Alderwood to hire firefighters to conduct an around-the-clock fire watch during the ninety-day period when the semi-ambulatory and nonambulatory residents lived at Alderwood and there was no sprinkler system. Mr. Kilkelly disagreed with hiring firefighters for the fire watch in the interim, and hedged about meeting the ninety-day time requirement.

On July 24, 2003, the superior court denied the motion to stay the license suspension, ruling that the Kilkellys had not met their burden. Finally, after the superior court decision, Mr. Kilkelly's attorney notified DSHS that he would agree to hiring firefighters and to the other conditions proposed by DSHS. DSHS did not accept the offer. CarePartners sought an emergency stay from the Washington court of appeals. On July 29, the court of appeals denied the motion for an emergency stay. The court

concluded that "the fire hazard identified by the state Fire Marshal is a sufficient threat to the residents' welfare to justify [DSHS's] actions [and if] a stay is imposed, [DSHS] will be deterred from enforcing its mandate to protect semi-ambulatory and nonambulatory residents from danger." App. 65a.

3. Other Interactions Between DSHS And Boarding Homes Operated By CarePartners

Around the time of the Alderwood dispute, there were two other interactions between CarePartners and DSHS. The first involved a facility called the Maple Creek Retirement Inn. This facility had been a licensed boarding home but, in May 2002, it gave up its license and operated as a senior residential facility that did not require a license.

In early 2003, CarePartners entered into an agreement to buy the facility to operate as a boarding home. The sale was conditioned on obtaining a boarding home license. Wash. Admin. Code 388-78A-020(2)(b) (2003) (App. 97a) requires that an application for a new license receive approval of facility plans for construction review. This would require the facility to meet current building code standards. Wash. Admin. Code 388-78A-340(1) (2003) (App. 103a) authorizes DSHS to exempt a licensee from meeting specific requirements, if DSHS determines the exemptions will not jeopardize the health or safety of residents.

Mr. Kilkelly was informed in his initial contact with DSHS that he would be required to meet the

requirements of a new license. On February 5, 2003, Mr. Kilkelly wrote to DSHS seeking an exemption from the construction review requirement. He pointed out that the facility met the building code when it was built and licensed in 1989, and stated that there had been no structural changes to the facility. He also argued that the community needed more boarding homes and that he would not be able to operate the facility if he was required to pay for building improvements.

At the same time Mr. Kilkelly wrote to DSHS seeking the exemption, he communicated with members of the Washington State Legislature and requested that they use whatever influence they could bring to bear with DSHS to ensure that the exemption was granted. Mr. Kilkelly sent copies of his communications with DSHS to these members of the Legislature.

On February 14, DSHS denied the request for an exemption and stated that his application would be processed as an initial application, as DSHS had done in similar situations. DSHS gave two reasons. First, granting the exemption would treat CarePartners differently than others in the boarding home industry. Second, the residents of the facility would not receive the benefit of improved health and safety standards adopted over the last ten years. The letter denying the exemption was also sent to the legislators contacted by Mr. Kilkelly.

A second interaction involved a boarding home operated by CarePartners called Meridian Hills Assisted Living. After an inspection of the facility, DSHS found three deficiencies and imposed a civil

penalty of $300—one hundred dollars for each violation. CarePartners filed an administrative appeal contesting the fine. A hearing was held on January 27 and February 3, 2003. On April 14, the Administrative Law Judge who heard the case upheld the penalty.

On April 28, CarePartners petitioned for review of that decision. On October 20, 2003, a review judge concluded that DSHS had only proved two of the three violations—and reduced the penalty from $300 to $200.

4. Proceedings In The Lower Courts

In June 2005, CarePartners and the Kilkellys filed an action under 42 U.S.C. § 1983 in federal district court for the Western District of Washington. The complaint alleged that the defendants conspired to violate the Kilkellys' rights under the United States Constitution.

a. District Court

The defendants moved for summary judgment claiming qualified immunity with regard to the three constitutional claims made by CarePartners. The district court granted in part and denied in part the motion. App. 34a. The court started with CarePartners' procedural due process claim. The court began its analysis considering "whether '[t]aken in the light most favorable to the party asserting the injury . . . the facts alleged show the officer's conduct violated a constitutional right[.]'" App. 42a (alterations in original) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). CarePartners

claimed due process required a hearing prior to the suspension of Alderwood's license. App. 45a.

Applying the factors in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the court concluded that the state had a substantial interest in "protecting vulnerable boarding home residents from fire" (App. 45a) and that there was minimal risk of erroneous deprivation. Both the Washington superior court and court of appeals considered and rejected CarePartners' application for a stay pending the administrative appeal. These were "pre-deprivation determinations made by 'an independent body' indicating that the deprivation in question was 'not arbitrary.'" App. 46a (quoting *FDIC v. Mallen*, 486 U.S. 230, 244 (1988)).

The district court next considered the First Amendment claim that DSHS took action against Alderwood's license to retaliate against Mr. Kilkelly. The court applied a two-part causation test. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314–16 (9th Cir. 1989). First, "the court looked to determine whether plaintiffs had made an initial showing that the protected conduct was a substantial or motivating factor in the defendants' decision." App. 52a (internal quotation marks omitted). Second, if a prima facie showing had been made, the "burden shifts to the defendant to establish that it *would* have reached the same decision even in the absence of the protected conduct." App. 52a.

CarePartners pointed to five acts of speech that they claimed led to the retaliation: First,

"Kilkelly's pursuit of an administrative appeal of the fine levied against Meridian Hills[.]" App. 53a. Second, "Kilkelly's legislative lobbying efforts to acquire a license for the [Maple Creek] facility [.]" App. 53a. Third, "Kilkelly's advocacy related to his interpretation of the building codes which would have permitted the Alderwood facility to be grandfathered out of the sprinkler installation requirements[.]" App. 53a. Fourth, "Kilkelly's statement to the press after the license revocation on July 11, 2003[.]" App. 53a. Fifth, "Kilkelly's pursuit of both administrative review and a court ordered stay of the summary revocation of his license." App. 53a.

The court concluded that CarePartners had made a prima facie showing that the state defendants' actions, with regard to Alderwood, were substantially motivated by a desire to retaliate. The court pointed to three things to support its conclusion. First, the timing of the investigation and suspension occurred about the same time as the administrative hearing regarding Meridian Hills and Kilkelly's request to state legislators that they use their influence to help obtain a license for Maple Creek. App. 54a. Second, state officials indicated that Kilkelly was "known" to DSHS and that officials were "quickly losing patience with Joe." App. 54a. Third, there was some evidence that other boarding home facilities were given more favorable treatment. App. 54a.

Having concluded that CarePartners made a prima facie case, the court declined to consider the second part of the test—whether the defendants would have reached the same decision even in the

absence of the protected conduct. According to the court, "circumstantial evidence created a genuine issue of material fact on the question of retaliatory motive when a plaintiff produces evidence of proximity in time between the protected action and the allegedly retaliatory action." App. 54a–55a (internal quotation marks omitted).

The defendants argued that the two-part *Mt. Healthy* test did not properly recognize the state's interest in protecting elderly, infirm boarding home residents from fire, and that the court should recognize that interest by applying the requirements for a First Amendment retaliation claim in the public employment context. This would include limiting the First Amendment protection to speech involving issues of public concern and balancing the state's interest with the private interest. *See Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Illinois*, 391 U.S. 563 (1968). The district court rejected this argument because it "incorrectly attempt[s] to export First Amendment standards specific to the public employee context[.]" App. 51a.

The district court next considered the second part of the qualified immunity analysis—whether the law was clearly established. Based on *Soranno's Gasco*, the district court held that it "was clearly unlawful in 2003 to deliberately retaliate against a citizen's exercise of his right to comment on the actions of government officials or exercise his right to access the courts and the administrative appeals process[.]" App. 55a–56a. The court concluded that the state defendants "are not entitled to qualified immunity on this claim." App. 56a.

Finally, the district court addressed CarePartners' substantive due process claim. The court explained that "substantive due process cannot supply the basis for a Section 1983 claim if the challenged governmental conduct is prohibited by another, more specific, constitutional right." App. 56a. The court dismissed the claim because the "conduct challenged is more than adequately addressed by plaintiffs' procedural due process and first amendment claims." App. 56a.

Subsequently, the district court granted a motion to reconsider by the defendants. The order granted a motion to strike evidence about other facilities, which had been asserted by CarePartners as comparators, because it was hearsay. App 70a

b. The Ninth Circuit Court Of Appeals

The defendants appealed the district court's denial of qualified immunity on the First Amendment claim to the Ninth Circuit. The Ninth Circuit affirmed the district court. App. 1a.

In determining whether there was a constitutional violation, the Ninth Circuit considered the same five acts of speech to which the district court pointed. The court held that CarePartners had met its initial burden of establishing a prima facie case. App. 20a–21a. The Ninth Circuit viewed defendants' actions with regard to Alderwood as "suspiciously close in time to the administrative hearing on the Meridian facility and Kilkelly's lobbying efforts regarding the [Maple Creek] facility." The Ninth Circuit also relied on statements that "DSHS officials were 'quickly losing patience' with Kilkelly" and that he was "known to the

department" to support "the existence of a retaliatory intent[.]" App. 20a. The Ninth Circuit considered "e-mails that suggest DSHS was planning to take action against Alderwood and Wenatchee before it conducted its follow-up inspections" and concluded that "the record indicates that DSHS may have been deliberately refusing to communicate with Kilkelly[.]" App. 20a.

With regard to the second part of the test, the Ninth Circuit held that "the district court properly declined to determine whether the State *would* have made the decisions it did in the absence of Kilkelly's protected speech and petition activity because issues of fact remained with regard to the State employees' motivations." App. 20a–21a.

The Ninth Circuit rejected the defendants' argument that the *Mt. Healthy* test did not adequately recognize the state's substantial interest in protecting boarding home residents from fire. The defendants argued that CarePartners should be required to "plead and prove an 'absence of probable cause' with respect to their enforcement decisions, relying on *Hartman v. Moore,* 547 U.S. 250 (2006)." App. 17a n.7. *Hartman* involved a claim of retaliatory-prosecution. The Ninth Circuit distinguished *Hartman* because in a retaliatory-prosecution action a plaintiff "must plead and show the absence of probable cause for pressing the underlying criminal charges, and based its holding on the unique need to 'bridge' a causation gap between the non-prosecuting government agent's retaliatory animus and the prosecutor's independent decision, which is accorded presumptive regularity." App. 17a–18a n.7. The Ninth Circuit held that this

"does not apply to this case because the Court made a clear distinction between retaliatory-prosecution actions to which the additional pleading and proof requirements apply, and 'ordinary' retaliation actions to which the requirements do not apply (i.e., where there is no independent prosecutorial action)." App. 18a n.7.

In the alternative, the defendants argued that the court should accommodate the state's interest by applying the requirements for a First Amendment retaliation claim in the public employment context. The court rejected this argument because "the rationales underlying the 'public concern' requirement and the *Pickering* balancing test in the public employee context do not support the extension of this analytical framework to the regulated entity context." App. 22a.

The Ninth Circuit affirmed the district court's decision that the defendants had violated clearly established law, relying on *Soranno's Gasco*. According to the Ninth Circuit, *Soranno's Gasco* "held that it is unlawful for the government to deliberately retaliate against a citizen for exercising his right to comment on (and publicly criticize) government officials' actions and his right to access the courts and administrative appeals process for redress of grievances." App. 30a.

On October 9, 2008, the defendants filed a timely petition for rehearing en banc that was denied on November 10, 2008. App. 67a.

REASONS FOR GRANTING THE PETITION

1. The Decision Below Effectively Eliminates Qualified Immunity For Officials Enforcing Requirements On Closely Regulated Business In First Amendment Retaliation Claims

"Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and *the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.*" *Pearson v. Callahan*, No. 07-751, 2009 WL 128768, at *6 (U.S. Jan. 21, 2009) (emphasis added). Qualified immunity is "an immunity from suit rather than a mere defense to liability" (*id.*), therefore, "it is effectively lost if a case is erroneously permitted to go to trial." *Id.* The Ninth Circuit's decision, in this case, effectively denies qualified immunity to public officials enforcing statutes and rules with regard to closely regulated business.

This case involves the regulation of boarding homes and, specifically, protecting elderly, infirm residents from fire. The district court recognized that the state has a substantial interest "in protecting vulnerable boarding home residents from fire hazards, particularly those who are semi or non-ambulatory." App. 45a. But the Ninth Circuit's decision gives no weight to the state's interest in performing its qualified immunity analysis.

This is surely error. The state statutes and rules, regulating boarding homes, do not regulate speech, nor do they impose an incidental limit on

First Amendment rights. Yet, in analyzing statutes that do regulate speech directly or incidentally, the Court has consistently, and in a variety of contexts, considered the government's interest. "[W]here speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 495 (1986) (cable television access/speech balanced against need for limits on access to municipal cable facilities) (citing *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (draft card destruction enforcement, even if burned in protest)); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 702–04 (1986) (prostitution enforcement may cause book store closure despite interfering with sales of adult books); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984) (prohibited sleeping in national parks, even if intended as protest).

The Ninth Circuit's failure to recognize the state's substantial interest in fire protection in boarding homes effectively eliminates qualified immunity in First Amendment retaliation claims by closely regulated business. Under the decision below, speech opposing regulation constitutes a prima facie case that the protected conduct was a substantial or motivating factor in the defendants' decision. Then, under the decision, the burden shifts to defendant to prove that the action would have been taken, even in the absence of the protected conduct, which can only be determined by a jury. App. 20a; *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1315 (9th Cir. 1989) ("motivation generally presents a jury question").

The Ninth Circuit's rationale for finding a prima facie case involved little more than a contentious relationship between a regulator and a regulated entity. First, the Ninth Circuit stated that the actions with regard to Alderwood "were suspiciously close in time to the administrative hearing on the Meridian facility and Kilkelly's lobbying efforts regarding the [Maple Creek] facility." App. 20a. CarePartners operated a number of boarding homes. Since boarding homes are closely regulated, there is nothing unusual about having multiple regulatory issues pending at the same time. There is no evidence, except for the timing, that DSHS was motivated by the Maple Creek appeal. Any corporation operating a number of closely regulated businesses would be able to generate the same kind of timing evidence. Similarly, any regulated entity could communicate with state legislators seeking their intervention. Again, there is no evidence that DSHS was motivated by this communication.

The Ninth Circuit pointed to CarePartners' lawyer's statement that DSHS's lawyer had a negative inflection in her voice when she said that Mr. Kilkelly was "known" to DSHS, and that DSHS officials were "losing patience" with him. App. 20a. If this is evidence of retaliatory intent, then any regulated entity can meet this standard by simply refusing to comply with the regulations. And the more vigorously the business resists, the better case it can make. In such a situation, the business refusing to comply will always be known to the agency, and the agency will likely be losing patience. But, this is hardly evidence of retaliatory

intent. "[Boarding] homes are a highly regulated industry, and some tension between operators of homes and regulators is to be expected, as are occasional adversarial proceedings." *Woodruff v. Mason*, 542 F.3d 545, 552 (7th Cir. 2008). "If the natural tensions that result from adversarial proceedings and regulatory enforcement actions sufficed to establish evidence of retaliatory motive, then the regulatory scheme could very well be undermined. State enforcement agencies have every right to vigorously enforce the law." *Id.*

Finally, the Ninth Circuit pointed to some "e-mails that suggest DSHS was planning to take action against Alderwood and Wenatchee before it conducted its follow-up inspections [and that] the record indicates that DSHS may have been deliberately refusing to communicate with Kilkelly[.]" App. 20a. Planning to take action against a closely regulated business suspected of not complying with important regulations—like the fire safety standards at issue here—is not evidence of retaliation. And, DSHS headquarters refused to meet with Mr. Kilkelly because he wanted to meet to have the conditions lifted. The fact that DSHS was not willing to meet to discuss lifting the conditions proves nothing.

Any closely regulated business that refuses to comply with regulations could likely produce the same evidence as CarePartners in this case. Essentially, this is a "retaliation claim[] by citizens seeking to avoid the consequences of their illegal actions." *Osborne v. Grussing*, 477 F.3d 1002, 1006 (8th Cir. 2007). "In a regulatory enforcement situation, the government has an even stronger

interest in not putting the violator in a better position as a result of the exercise of constitutionally protected conduct[.]" *Id.* (internal quotation marks omitted). Recognizing this government interest requires "a stricter causation requirement in this context than the burden-shifting standard adopted by *Mt. Healthy* in the public employment context." *Id.*

The consequences of failing to apply a stricter standard are severe. In *Butz v. Economou*, 438 U.S. 478 (1978), this Court explained that regulatory enforcement and criminal prosecution share similar concerns, because "[t]he discretion which executive officials exercise with respect to the initiation of administrative proceedings might be distorted if their immunity from damages arising from that decision was less than complete." *Butz*, 438 U.S. at. 515 Moreover, "there is a serious danger that the decision to authorize proceedings will provoke a retaliatory response. An individual targeted by an administrative proceeding will react angrily and may seek vengeance in the courts. A corporation will muster all of its financial and legal resources in an effort to prevent administrative sanctions. 'When millions may turn on regulatory decisions, there is a strong incentive to counter-attack.'" *Id.* at 515.

The Ninth Circuit erred by refusing to recognize the state's substantial regulatory interest by requiring CarePartners to plead and show that DSHS had no probable cause to take the actions it did at Alderwood. The lack of probable cause negates the causation necessary to CarePartners' retaliation claim.

2. The Ninth Circuit's Holding That The Probable Cause Standard From *Hartman* Does Not Apply Conflicts With Decisions Of The Sixth And Eighth Circuits

a. *Hartman v. Moore* Requires A Plaintiff To Plead And Prove The Absence Of Probable Cause

In *Hartman v. Moore*, 547 U.S. 250 (2006), the plaintiff brought an action against two postal inspectors and a prosecutor under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The plaintiff claimed that the federal officials "had engineered his criminal prosecution [against him] in retaliation for criticism of the Postal Service" in violation of the First Amendment. *Hartman*, 547 U.S. at 254. In considering this claim, the Court did not simply apply the two part *Mt. Healthy* test. The Court also required the plaintiff to plead and prove the absence of probable cause for pressing the underlying criminal charge, in order to make a prima facie case. According to the Court, "a retaliatory motive on the part of an official urging prosecution combined with an absence of probable cause supporting the prosecutor's decision to go forward are reasonable grounds to suspend the presumption of regularity behind the charging decision[.]" *Hartman*, 547 U.S. at 265.

The Court gave two reasons for the requirement. First, a prosecution case is different because "there will always be a distinct body of highly valuable circumstantial evidence available

and apt to prove or disprove retaliatory causation, namely evidence showing whether there was or was not probable cause to bring the criminal charge." *Hartman*, 547 U.S. at 261. A lack of probable cause "will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution[.]" *Id.* On the other hand, "establishing the existence of probable cause will suggest that prosecution would have occurred even without a retaliatory motive." *Id.*

Second, the "requisite causation between the defendant's retaliatory animus and the plaintiff's injury is usually more complex than it is in other retaliation cases, and the need to show this more complex connection supports a requirement that no probable cause be alleged and proven." *Hartman*, 547 U.S. at 261. This is because the "defendant will be a nonprosecutor, an official, like an inspector here, who may have influenced the prosecutorial decision but did not himself make it, and the cause of action will not be strictly for retaliatory prosecution, but for successful retaliatory inducement to prosecute." *Id.* at 262.

The Ninth Circuit should have required CarePartners to plead and show the absence of probable cause to suspend and revoke Alderwood's license. Although this action was not a criminal prosecution, it is not an ordinary retaliatory speech case.[3] Rather, it involves state supervision of a

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[3] As this Court recognized in *Butz*, 438 U.S.at 515: "The decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal

closely regulated business, and there is "a distinct body of highly valuable circumstantial evidence available and apt to prove or disprove retaliatory causation[.]" *Hartman*, 547 U.S. 261. In this case, there was surely probable cause to take action against Alderwood's license. There is no dispute that Alderwood did not have a sprinkler system. And, although there was no independent prosecutor, both the Thurston County superior court and the Washington court of appeals denied a stay because, "the fire hazard identified by the State Fire Marshal is a sufficient threat to the residents' welfare to justify [DSHS's] actions [and if] a stay is imposed, [DSHS] will be deterred from enforcing its mandate to protect semi-ambulatory and non-ambulatory residents from danger." App. 65a.

The Ninth Circuit refused to apply the probable cause standard from *Hartman* because the case did not involve an independent prosecutor. According to the Ninth Circuit, the "Court made a clear distinction between retaliatory-prosecution actions to which the additional pleading and proof requirements apply, and 'ordinary' retaliation actions to which the requirements do not apply (i.e., where there is no independent prosecutorial action)." App. 18a. n.7.

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prosecution. An agency official, like a prosecutor, may have broad discretion in deciding whether a proceeding should be brought and what sanctions should be sought."

b. The Ninth Circuit's Decision Conflicts With Decisions Of The Sixth And Eighth Circuits

The Ninth Circuit's decision to limit *Hartman* to cases that involve an independent prosecutor conflict with decisions of the Sixth and Eighth Circuits that do not recognize that limitation.

In *Barnes v. Wright*, 449 F.3d 709 (6th Cir. 2006), the Sixth Circuit considered a plaintiff who confronted two conservation officers, brandished a weapon, and complained vehemently about the officers' inability or unwillingness to control the plaintiff's rowdy neighbors. The officers initiated grand jury proceedings against the plaintiff. The officers testified at the proceedings, and the grand jury issued a three-count indictment against the plaintiff, leading to the plaintiff's arrest. *Barnes*, 449 F.3d at 711–12. The plaintiff filed a § 1983 action against the officers claiming, among other things, that prosecution was in retaliation for his speech in violation of the First Amendment.

Although there was no independent prosecutor involved, the Sixth Circuit required the plaintiff to plead and show the absence of probable cause. According to the court, "concerns regarding the intervening actions of a prosecutor do not apply in this case, because the officers themselves initiated the grand jury proceedings against Barnes." *Barnes*, 449 F.3d at 720. Despite this fact, the court applied the probable cause requirement because "in its analysis, *Hartman* appears to acknowledge that its rule sweeps broadly; the Court noted that causation in retaliatory-prosecution cases is *usually* more

complex than it is in other retaliation cases." *Id.* (internal quotation marks omitted).

The Eighth Circuit reached the same conclusion in *Williams v. City of Carl Junction, Missouri*, 480 F.3d 871 (8th Cir. 2007). In *Williams*, the plaintiff was "a self-described vociferous critic of the City and an acknowledged pain in the neck to the City, its officials, and employees." *Williams*, 480 F.3d at 873 (internal quotation marks omitted). During a roughly two-year period, the plaintiff was issued a total of twenty-six municipal citations for things such as failing to obtain a business license, parking offenses, and solid-waste infractions. *Id.* at 874. The plaintiff brought a § 1983 action claiming that the citations were in retaliation for his exercise of his First Amendment rights.

The Eighth Circuit applied the probable cause requirement from *Hartman*, following the Sixth Circuit's decision in *Barnes*. According to the court: "We agree with the Sixth Circuit that the Supreme Court's holding in *Hartman* is broad enough to apply even where intervening actions by a prosecutor are not present, and we conclude that the *Hartman* rule applies in this case." *Williams*, 480 F.3d 876. The court explained that the plaintiff alleged that the mayor harbored retaliatory animus against him. Thus, "the issuance of the citation was based on the Mayor's, not the issuing officer's, alleged retaliatory motive." *Id.* As a result, the court concluded that "even without the intervening actions of an individual denominated 'prosecutor,' the issue of causation in this case raises the same complications as those described in *Hartman*[.]" *Id.*

Another Eighth Circuit decision expressly recognizes the conflict with the decision below. In *Cross v. Mokwa*, 547 F.3d 890 (8th Cir. 2008), a city was hosting a large conference and was concerned that violent out-of-town protesters would stay illegally in unoccupied or condemned buildings. In response, the city adopted a building enforcement plan. As part of that plan the police arrested five people occupying a condemned building. *Cross*, 547 F.3d at 893. These individuals brought a § 1983 action claiming that the enforcement plan violated their First Amendment rights. Following *Williams*, the court dismissed the action because "there was probable cause to enforce the housing ordinance, the plaintiffs could not succeed on a claim of selective enforcement under the First Amendment with respect to proper code enforcement actions." *Id.* at 896–97 (internal quotation marks omitted).

Judge Bye concurred in this decision "reluctantly" because he was bound by circuit precedent. *Cross*, 547 F.3d at 903–04. However, in Judge Bye's view, the Eighth Circuit "erroneously extended *Hartman,* which solely addressed retaliatory-prosecution claims, i.e., where the government agent allegedly harboring the animus induced the prosecutor to bring charges that would not have been initiated without his urging." *Id.* at 904 (internal quotation marks omitted). Judge Bye concluded that the Ninth Circuit's decision in this case was the proper analysis. *Id.* ("[T]the *Williams* court incorrectly concluded *Hartman*'s no-probable-cause requirement should also apply to ordinary retaliation actions. *See CarePartners, LLC v. Lashway*, 545 F.3d 867, 2008 WL 4352597, at *6 n.7

(9th Cir. Sept. 25, 2008) (refusing to extend *Hartman*'s probable-cause requirement to ordinary retaliation claims)[.]").

The conflict between the Ninth and the Sixth and Eighth Circuits is direct, and this Court should grant the petition to resolve it.

3. The Law Was Not Clearly Established Whether CarePartners Was Required To Plead And Show An Absence Of Probable Cause

The Ninth Circuit ruled that there was clearly established law to guide the defendants in this case. App. 30a. The test of "clearly established law" is one of "objective legal reasonableness." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). The constitutional right must not be merely alleged in the abstract. The "right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. This inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (internal quotation marks omitted).

In First Amendment cases, this Court's jurisprudence has historically sought to accommodate the needs of government to effectively implement plans and programs that promote public health and safety, with the often countervailing interest of permitting criticism of those same plans

and programs. In the context of retaliation claims, different standards have been developed based on different circumstances. For example, for public employees and independent contractors, the *Pickering* balancing test, the *Connick* public concern test, and the *Garcetti* job responsibility test have developed over time.[4]

The analytical framework from these public employment cases has been extended in independent contractor, *Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 678 (1996), and more recently to the enforcement of an anti-recruitment regulation by an athletic league, *Tennessee Secondary School Athletic Association v. Brentwood Academy*, 127 S. Ct. 2489 (2007). The scope of First Amendment protection has also been restricted based on the unique needs of schools and prisons. *See Morse v. Frederick*, 127 S. Ct. 2618 (2007) (speech, which would have been protected in a public forum, could not provide the basis for a First Amendment claim in a public school); *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) (reasonable fears of correctional officers that organizational activities of the sort advocated by the union could impair discipline and lead to possible disorders justified regulations).

Similarly, in *Bivens* actions, the need to limit liability on First Amendment retaliation claims is

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[4] *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will County, Illinois*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

also well recognized.[5] *Wilkie v. Robbins*, 127 S. Ct. 2588, 2601 (2007), held that retaliation in the form of property regulation enforcement was not actionable because of the government's legitimate "interest in getting access to neighboring lands." The comprehensive administrative scheme that is in place for protecting federal civil servants precludes recognition of a new judicial remedy for federal employees alleging First Amendment retaliation. *See Bush v. Lucas*, 462 U.S. 367, 388–89 (1983); *see also Hudson Valley Black Press v. I.R.S.*, 409 F.3d 106, 113–14 (2d Cir. 2005) (collection of taxes would become chaotic if a tax payer could bring a damages action against Treasury employees for a retaliatory audit); *Munsell v. Dep't of Agric.*, 509 F.3d 572 (D.C. Cir. 2007) (failure to exhaust administrative remedies would preclude a *Bivens* action based on retaliatory regulatory enforcement).

When "speech" and "non-speech" elements are combined in the same course of conduct, sufficiently important governmental interests in regulating the non-speech element can justify incidental limitations on First Amendment freedoms. *United States v. O' Brien*, 391 U.S. 367, 376 (1968) (burning draft card in protest did not immunize enforcement of regulation to not destroy card). *See generally City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 495 (1986) (where speech and conduct are joined

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[5] In *Harlow*, this Court noted that "it would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officers under § 1983 and suits brought directly under the constitution against federal officials.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.30 (1982) (quoting *Butz v. Economou*, 438 U.S. 478, 504 (1978)).

in a single course of action, First Amendment values must be balanced against competing societal interest).[6]

The Ninth Circuit concluded the state of Washington's interests in protecting vulnerable seniors from fire danger, through the enforcement of valid regulations, was entitled to no accommodation under the First Amendment, and the law was clearly established on that point by a 1989 case, *Soranno's Gasco, Inc. v. Morgan*, 874 F. 2d 1310 (9th Cir. 1989), in which that issue was never decided. In *Soranno's Gasco*, the defendants did not dispute that the activity Soranno's alleged to have induced the retaliation was protected by the First Amendment. Instead, the only issue before the court was whether there was a genuine issue of material fact on the causation test under *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). The Ninth Circuit held that an issue of fact did exist.

The Ninth Circuit did not acknowledge or consider that, at the time of the events giving rise to this law suit, the circuits were divided about whether a showing of probable case was required. The Second, Fifth, Eighth, and Eleventh Circuits required a showing of the absence of probable cause. *Mozzochi v. Borden*, 959 F.2d 1174, 1179–80 (2d Cir. 1992) ("Without examining the motive, we held that, because there were reasonable grounds for the

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[6] Under the Fourth Amendment, this Court has accommodated the government's interests in overseeing the operation of closely regulated businesses, such as CarePartners, through a modification of the warrant requirement. *See New York v. Burger*, 482 U.S. 691, 702 (1987).

defendant to believe that probable cause existed, the defendant was entitled to qualified immunity."); *Keenan v. Tejeda*, 290 F.3d 252, 260 (5th Cir. 2002) ("[W]e have held that retaliatory criminal prosecutions in violation of the First Amendment are actionable only if a plaintiff can also prove the common-law elements of malicious prosecution, including the absence of probable cause to prosecute."); *Smithson v. Aldrich*, 235 F.3d 1058, 1063 (8th Cir. 2000) ("Furthermore, even if this pretextual argument were proven at trial, it would not nullify the finding of probable cause to believe that Smithson was violating the sound ordinance, nor would it prevent the application of the qualified immunity defense."); *Wood v. Kesler*, 323 F.3d 872, 883 (11th Cir. 2003) ("That retaliatory prosecution claim, however, is also defeated by the existence of probable cause."). On the other hand, the Tenth Circuit did not. *Poole v. County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001).

The Ninth Circuit analyzed the issue of whether the law required a defendant to plead and show the absence of probable cause based on its reading of this Court's 2007 decision in *Hartman*, not based on the foregoing circuit split that existed in 2003, the time period at issue. Similarly, the Ninth Circuit not only rejected arguments to extend the *Connick* public concern requirement and the *Pickering* balancing test to this case, based upon this Court's 2008 decision in *Brentwood Academy*, but also concluded that the law was clearly established that those tests did not apply based upon the 1989 decision in *Soranno's Gasco*, which never contemplated either issue. That decision did not

clearly establish the law, either on the applicability of the absence of probable cause requirement, or on the propriety of extending the *Connick/Pickering* analysis to claims of regulatory retaliation. The defendants should be granted the qualified immunity to which they are entitled.

CONCLUSION

For the reasons stated herein, the petition should be granted and the decision below should be reversed.

ROBERT M. MCKENNA
Attorney General

William Berggren Collins
Deputy Solicitor General
Counsel of Record

Michael P. Lynch
Senior Counsel

D. Thomas Wendel
Assistant Attorney General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAREPARTNERS LLC, limited liability corporation under the Laws of the State of Washington doing business as Alderwood Assisted Living; CAREPARTNERS MANAGEMENT, limited liability corporation under the Laws of the State of Washington doing business as Alderwood Assisted Living; Joseph Kilkelly and Laura Kilkelly, owners of CAREPARTNERS, LLC, individually and on behalf of their marital community, *Plaintiffs-Appellees*, v. PAT LASHWAY, Director of Residential Care of Services for the Washington State Department of Social and Health Services (DSHS) in her individual capacity; NANCY TYSON, Boarding Home Enforcement Officer, for Residential Care Services and Aging Adult Services for DSHS, in her individual capacity; JOYCE STOCKWELL, an	No. 07-35125 D.C. No. CV-05-01104-RSL OPINION

employee of DSHS in her individual capacity; ROBERT MCCLINTOCK, Regional Administrator for DSHS in his individual capacity also known as Bob McClintock; JULIE LORD, Licensing Field Manager for Residential Care Services for DSHS in her individual capacity; KATHRYN WEBB, Lead Field Inspector for Residential Care Services for DSHS in her individual capacity; MARY CORSO, formerly the Fire Marshal for the State of Washington in her individual capacity; ROGER WOODSIDE, Assistant State Fire Marshal for the State of Washington in his individual capacity; ED BORGATTI, Chief Deputy State Fire Marshal for the State of Washington in his individual capacity; MICHAEL STURGEON, Deputy Fire Marshal for the State of Washington in his individual capacity, *Defendants-Appellants.*	

Appeal from the United States District Court
For the Western District of Washington
Robert S. Lasnik, District Judge, Presiding

Argued and Submitted
June 5, 2008-Seattle, Washington

Filed September 25, 2008

Before: Ferdinand F. Fernandez and Consuelo M. Callahan, Circuit Judges, and Irma E. Gonzalez, District Judge*

Opinion by Judge Callahan

COUNSEL

Robert M. McKenna, Attorney General for the State of Washington, Olympia, Washington, D. Thomas Wendel (Argued), Assistant Attorney General for the State of Washington, on behalf of defendants-appellants Pat Lashway, *et al.*

Paul A. Lindemuth, Esq., Law Office of Ben F. Barcus & Associates, P.L.L.C., Tacoma, Washington, on behalf of plaintiffs-appellees CarePartners, LLC, *et al.*

OPINION

CALLAHAN, Circuit Judge:

CarePartners, LLC, CarePartners Management, and Joseph and Laura Kilkelly, as individual owners of the CarePartners entities (collectively, "CarePartners"), sued several employees and representatives of the Washington State Department of Social and Health Services ("DSHS") and the Washington State Fire Marshal's office ("fire

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* The Honorable Irma E. Gonzalez, Chief United States District Judge for the Southern District of California, sitting by designation.

marshal") in their individual capacities (collectively, the "State employees") claiming that the State employees engaged in retaliatory enforcement of state boarding home laws and regulations against CarePartners, which operated boarding homes in Washington State. CarePartners alleged that the State employees retaliated against its facilities, including revocation of one facility's license, in response to Joseph Kilkelly's ("Kilkelly") constitutionally protected speech and petition activities; namely, his critical public speech about DSHS and its interpretations of certain regulations, his lobbying activities in connection with seeking a license from DSHS, and his filing of an administrative appeal as to one of DSHS's regulatory decisions. In this interlocutory appeal, the State employees appeal the district court's denial of their motion for summary judgment on their defense of qualified immunity. Viewing the facts in a light most favorable to CarePartners, and based on circuit precedent, we hold that the State employees are not entitled to qualified immunity. Accordingly, we affirm the district court's denial of summary judgment.

I. Factual Background

A. Regulatory background

The State of Washington licenses and regulates boarding homes (i.e., assisted living facilities for the elderly). Wash. Rev. Code §§ 18.20.020(1), 18.20.030. The State has instituted comprehensive regulations covering various aspects of boarding home construction and operation. *See* Wash. Admin. Code §§ 388-78A-2010-2050. These

rules are generally enforced by DSHS and its Resident Care Services department ("RCS"), but fire protection standards are enforced by the Washington State Patrol through the director of fire protection (i.e., the fire marshal's office). Wash. Rev. Code §§ 18.20.110, 18.20.130.

In 1995, the state building code council adopted a licensed care facility code ("LC Code") that requires automatic fire sprinklers if the facility has more than sixteen residents or has more than two residents who are non-ambulatory. Wash. Admin. Code § 51-40-0313.8.2.1 (1998). In response to a 1998 fire at a boarding home, which killed eight residents, the Washington Legislature enacted a program to subsidize the cost of retrofitting older facilities with fire sprinklers. As of 1999, licensed boarding homes could not accept and retain semi- or non-ambulatory residents unless "the boarding home [was] approved by the Washington state director of fire protection to care for semi-ambulatory or nonambulatory residents." Wash. Admin. Code § 388-78A-240(3)(a) (2002). In December 2001, Pat Lashway, as DSHS Director of RCS, sent letters to all boarding home operators indicating what conditions their facilities would have to meet to serve semi-and non-ambulatory residents.[1]

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[1] In 2002, the state fire marshal adopted the 1997 Uniform Fire Code, Wash. Admin. Code § 212-12-030(4) (2003), which mandates: "Existing licensed occupancies previously approved by the state fire marshal as in conformance with the standards then in effect shall have their existing use or occupancy continued, provided such continued use is not dangerous to life and is acceptable to the local fire and building

B. Kilkelly's acts and enforcement by the State employees

CarePartners operated three boarding homes in the State of Washington: Meridian Hills ("Meridian"), Alderwood Assisted Living ("Alderwood") and Wenatchee Assisted Living ("Wenatchee"). Alderwood and Wenatchee did not have sprinkler systems in place at the time of enforcement. This lawsuit is based on a series of acts through which Kilkelly exercised his rights of speech and petition, which CarePartners alleges led to the State employees' retaliatory enforcement with respect to the Alderwood and Wenatchee facilities.

1. Kilkelly's administrative appeal of the fine against Meridian

In 2002, the Meridian facility received an annual survey by RCS. Dissatisfied with that survey and an associated fine of $300, Kilkelly and CarePartners filed an administrative appeal in early 2003 to challenge the conclusions and results of the survey. CarePartners was critical of DSHS's assessment of the Meridian facility. Administrative hearings took place in January and February of 2003, and the State of Washington Department of Social and Health Services Board of Appeals eventually affirmed most of the administrative decision in DSHS's favor.

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officials having jurisdiction." Wash. Admin. Code § 212-12-010(4)(c) (2003).

2. Kilkelly's lobbying activity

In early February 2003, CarePartners entered into a letter agreement to lease a boarding home in Lakewood, Washington, from owners who had allowed their license to lapse. The lease was contingent on CarePartners's acquisition of a license from DSHS. Kilkelly engaged in an administrative letter campaign with DSHS, and specifically defendants Lashway and Nancy Tyson, over whether to treat CarePartners's application for a license as one related to an existing facility or as an initial facility application, in other words "grandfathering" the facility in under the old code. Concurrently, Kilkelly began lobbying state politicians for assistance in trying to acquire a license on favorable terms so that CarePartners could meet its stated goal of serving low to medium income residents. He contacted several state senators and met with a state representative's aide to discuss his licensing issue and to criticize DSHS. For example, an e-mail to state senators was entitled "Example of DSHS inflexibility in applying the existing rules-choosing control over whats [sic] best for public policy[.]"[2]

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[2] Kilkelly's affidavit also asserts that when one of CarePartners's facilities was shut down by DSHS and the leasehold transferred to another lessee, DSHS accommodated the transfer of the license as an existing license, not an initial application for a license. CarePartners contends that this is contrary to how his application for the Lakewood facility was treated by DSHS.

3. The State employees' enforcement action against Wenatchee and Alderwood

On February 2, 2003, a deputy fire marshal inspected Wenatchee and cited it for having too many semi- and non-ambulatory residents in a facility without fire sprinklers. Kilkelly contested those violations by letter. In February 2003, RCS conducted an inspection of Alderwood and found deficiencies related to the number of semi- and non-ambulatory residents present in the facility.

A June 2, 2003, e-mail indicates that DSHS was "planning to take action against Wenatchee" (and possibly Alderwood), and that DSHS wanted to get all concerned "'on board' and 'all our ducks alined' [sic]." However, internal e-mails sent between June 3, 2003, and June 5, 2003 indicate that the agencies had not yet reached agreement as to how the CarePartners facilities were to be treated under the relevant statutes and regulations with respect to fire sprinkler system requirements and ambulatory issues. One e-mail referred to the issue as "a curve ball." Another read, in part: "OK guys-I found an 'Ah Shit' in the pile."

Unannounced follow-up inspections at Alderwood and Wenatchee were conducted on June 23 and 24, 2003, noting several violations. On June 27, 2003, DSHS imposed immediate conditions on Wenatchee's and Alderwood's boarding home licenses. DSHS's order required both facilities to: (1) discharge all but two semi-ambulatory residents within 30 days; (2) hire staff within 24 hours who would be dedicated to conducting "fire watches

24 hours, 7 days per week"; (3) contact the fire marshal within 24 hours to discuss evacuation plans; and (4) train staff and residents on evacuation plans within seven days. On July 3, 2003, Alderwood appealed the decision to the Office of Administrative Hearings.

In or around early July 2003, CarePartners's attorney, Robin Dale, contacted the Attorney General's office and spoke with Assistant Attorney General Cobb, who represented DSHS and Lashway. In Dale's affidavit, she noted that Cobb "gave [her] the distinct impression that Mr. Kilkelly was not one of the Department's favorite people," and that "Mr. Kilkelly was 'known' to the department," a comment Dale remarked was delivered with "negative connotations." Dale further declared that in the following days she called Assistant Attorney General Hoover, who was purportedly involved with Kilkelly's licensing issues. According to Dale, Hoover indicated that " 'Pat (Lashway) is quickly losing patience with Joe [Kilkelly].' "

Dale arranged meetings on July 10 and 11, 2003 between Kilkelly, his attorney of record, RCS personnel, and the Assistant Attorney General to discuss the Wenatchee and Alderwood facilities. Kilkelly presented his plans of correction for both facilities on July 10th and 11th. According to Kilkelly's affidavit, this included installation of a sprinkler system at Alderwood. He had concluded "that the meeting had been very positive and that [they] were working towards a resolution" that would prevent Alderwood from closing.

Notably, the record indicates that during this entire period Kilkelly and his attorney were trying to contact DSHS and fire marshal officials to negotiate or discuss installation of fire sprinklers, but that those officials either refused to talk or would not engage in talks. For example, one internal Washington State Patrol e-mail, dated July 3, 2003, stated:

> I took a call from Mr. Kilkelly . . . . While the call went on for awhile [with me dancing like a trained bear to keep from saying anything], his main point was that he would be more than willing to negotiate a time frame within which he would guarantee the installation of a sprinkler system[s]. . . . He did spend some time letting me know how absolutely rotten he and his staff were treated by Mike . . . which I apologized for . .

Another internal Washington State Patrol e-mail, dated July 14, 2003, stated:

> [Kilkelly's attorney] just short of begged for a return call. He can't get anyone from DSHS to call him back . . . . . [sic] same story I got from Kilkelly. These folks are MORE than ready to install a sprinkler system, and they can't seem to get anyone to talk about that. . . . I'd hate like hell to see the system bust someone who is indicating they want to "make it right" . . . .

On July 11, 2003, Lashway summarily suspended Alderwood's license, stating that the "residents are in imminent threat of harm." The DSHS order also permanently revoked Alderwood's

license and halted admissions of new residents in that facility. That same day, a minority interest owner in CarePartners, Tom Tennent, contacted the news media and began generating negative news media about DSHS.

Alderwood immediately filed an administrative appeal of the order and sought an immediate stay of the order in Washington Superior Court. The Superior Court granted a temporary stay of the suspension, but that stay was eventually lifted by the Superior Court and the Washington Court of Appeals.

While the stay was in place, in July 2003, Kilkelly and his attorneys met with representatives of DSHS, the fire marshal's office and Assistant Attorney General Hoover. According to Dale's and Kilkelly's affidavits, the State was unwilling to negotiate unless Kilkelly agreed to new conditions, including the allegedly cost-prohibitive condition of hiring firefighters as 24-hour fire watchers.

The administrative appeal process continued while CarePartners pursued the present case in the district court and concluded after the district court denied the State employees' motion for summary judgment on qualified immunity in this case, which is discussed below. CarePartners withdrew its administrative appeal in May 2007, and the Superior Court entered an order dismissing that appeal with prejudice and deeming DSHS's licensing actions final.

C. District court proceedings

On June 17, 2005, CarePartners filed a complaint in district court for damages claiming violations of its First Amendment rights to freedom of speech and to petition for a redress of grievances (based on retaliation), violation of due process, and tortious interference with business relationships. After limited discovery, the defendants moved for summary judgment on the grounds that CarePartners's claims were barred by the *Rooker-Feldman* doctrine, and that they were entitled to qualified immunity. The district court held that: (1) CarePartners's claims were not barred by the *Rooker-Feldman* doctrine; (2) CarePartners's procedural and substantive due process claims failed as a matter of law; and (3) the defendants were not entitled to qualified immunity on the First Amendment retaliation claims. In denying the State employees' motion for summary judgment on their qualified immunity, the district court stated that it would entertain subsequent motions for summary judgment after the completion of discovery.

The State employees filed this appeal, challenging only the district court's decision denying summary judgment on their claim of qualified immunity in connection with the speech and petition-based retaliation claims.

II. Jurisdiction, Scope of Review, and Standard of Review

We have jurisdiction over this interlocutory appeal taken from the denial of the State employees' motion for summary judgment on their defense of qualified immunity. *See Mitchell v. Forsyth*, 472

U.S. 511, 530 (1985); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1059 (9th Cir. 2006) ("As a general rule, interlocutory appeals from determinations of qualified immunity are permissible."). The scope of our review, however, is limited. Specifically, although we may review whether the State employees violated clearly established law based on undisputed facts, we may not consider questions of " 'evidence sufficiency,' i.e., which facts a party may, or may not, be able to prove at trial." *Johnson v. Jones*, 515 U.S. 304, 313, 319-20 (1995);[3] *see also KRL v. Estate of Moore*, 512 F.3d 1184, 1188-89 (9th Cir. 2008); *Knox v. S.W. Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997) ("[W]e have jurisdiction over an interlocutory appeal from the denial of qualified immunity where the appeal focuses on whether the defendants violated a clearly established law given the undisputed facts, while we do not have jurisdiction over an interlocutory appeal that focuses

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[3] The Supreme Court recently announced that although a court in the typical qualified immunity case will adopt the plaintiff's version of the facts at the summary judgment stage, the court need not adopt the plaintiff's alleged facts that are "utterly discredited" by the record. *See Scott v. Harris*, 550 U.S. 372 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."). Here, however, the State employees have acknowledged the lack of any substantial dispute on the material facts presented by CarePartners, and the concerns raised in *Scott* are not germane.

on whether there is a genuine dispute about the underlying facts.").[4]

We review de novo the district court's denial of a motion for summary judgment based on qualified immunity. *Kennedy*, 439 F.3d at 1059; *Lee v. Gregory*, 363 F.3d 931, 932 (9th Cir. 2004). Regarding possible factual disputes, we assume that the version of the material facts asserted by the non-moving party–here, CarePartners–is correct. *KRL*, 512 F.3d at 1189; *see Kennedy*, 439 F.3d at 1059-60.

III. Discussion

In analyzing whether a public official is entitled to qualified immunity, we apply the two-part test from *Saucier v. Katz*, 533 U.S. 194 (2001).[5] First, the court asks whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right. *Inouye v. Kemna*, 504 F.3d 705, 712 (9th Cir. 2007) (citing *Saucier*, 533 U.S. at 201). Second, if there is a constitutional violation, the court asks whether the right was clearly established

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[4] Despite our and the Supreme Court's previous characterizations of what an appellate court may review in the context of an interlocutory appeal of a district court's denial of qualified immunity as one of "jurisdiction," we use the label "scope of review" here to avoid any confusion inherent to the word "jurisdiction." *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510-11, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006).

[5] We note that *Pearson v. Callahan*, 128 S. Ct. 1702 (2008) (No. 07-751), is pending before the United States Supreme Court. In *Pearson*, the Court directed the parties to brief and argue the question: "Whether the Court's decision in *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) should be overruled?"

at the time the official acted. *Id.* "To reject a defense of qualified immunity, we must find that 'the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates the right.'" *Id.* (quoting *Saucier*, 533 U.S. at 202). If the right was not clearly established at the time of the violation, the official is entitled to qualified immunity.[6] *Id.*

A. Constitutional violation

We must first answer the following question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the [officials'] conduct violated a constitutional right?" *Saucier*, 533 U.S. at 201.

1. Retaliation based on Kilkelly's First Amendment activity

The district court identified five acts that Kilkelly alleged led to retaliation by the State employees:

> (1) Kilkelly's pursuit of an administrative appeal of the fine levied against Meridian Hills Assisted Living; (2) Kilkelly's legislative

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[6] We have previously expressed the qualified immunity test as both a two-step test and a three-step test. *Inouye*, 504 F.3d at 712 n.6 (citing *Skoog v. County of Clackamas*, 469 F.3d 1221, 1229 (9th Cir. 2006) (characterizing the third step as an inquiry into the reasonableness of the officer's mistake)). As the *Inouye* court noted, however, the third step from *Skoog* appears to be subsumed in the second step as stated in our other decisions and in *Saucier*. *Id.* We use the two-step iteration of the test.

> lobbying efforts to acquire a license for the boarding home facility in Lakewood, Washington; (3) Kilkelly's advocacy related to his interpretation of the building codes which would have permitted the Alderwood facility to be grandfathered out of the sprinkler installation requirements; (4) Kilkelly's statement to the press after the license revocation on July 11, 2003; and (5) Kilkelly's pursuit of both administrative review and a court ordered stay of the summary revocation of his license.

These alleged activities fall within the First Amendment's protection of the rights to free speech and to petition for a redress of grievances. Kilkelly's lobbying efforts, advocacy regarding interpretation of the building codes, and his statements to the press are protected by his right to free speech.

In recognizing one's protected interest in commenting on government officials' actions, we have stated that "[i]t is clear that '[s]tate action designed to retaliate against and chill political expression strikes at the heart of the First Amendment.'" *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (citation omitted); *see also FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 405 (1984) (Rehnquist, C.J., dissenting) (noting that the right to lobby is constitutionally protected). Kilkelly's alleged acts of seeking administrative review and a court-ordered stay of the revocation of CarePartners's license are protected by his right to petition the government. *See BE & K Constr. Co. v. NLRB*, 536 U.S. 516, 525

(2002) (stating that the right to petition extends to all departments of government and that the right of access to the courts is but one aspect of the right of petition); *Soranno's Gasco*, 874 F.2d at 1314 ("The right of access to the courts is subsumed under the first amendment right to petition the government for redress of grievances.").

In *Soranno's Gasco*, we set forth the standard for evaluating whether a regulated entity has established a claim of retaliation based on the exercise of free speech and petition rights. 874 F.2d at 1314-15. A "plaintiff alleging retaliation for the exercise of constitutionally protected rights must initially show that the protected conduct was a 'substantial' or 'motivating' factor in the defendant's decision." *Id.* at 1314 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). If the plaintiff makes this initial showing, the "burden shifts to the defendant to establish that it would have reached the same decision even in the absence of the protected conduct." *Id.* To meet this burden, a defendant must show by a preponderance of the evidence that it *would* have reached the same decision; it is insufficient to show merely that it *could* have reached the same decision. *Id.* at 1315.[7]

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[7] The State employees would also have us impose a requirement on CarePartners to plead and prove an "absence of probable cause" with respect to their enforcement decisions, relying on *Hartman v. Moore*, 547 U.S. 250 (2006). We decline to do so. In *Hartman*, the Court held that a plaintiff in a retaliatory-prosecution action must plead and show the absence of probable cause for pressing the underlying criminal charges, and based its holding on the unique need to "bridge" a causation gap between the non-prosecuting government agent's

Because our decision in *Soranno's Gasco* directs our analysis here, we review the facts of that case in some detail. The plaintiffs in *Soranno's Gasco* were sellers and distributors of petroleum products that operated under certain bulk plant permits. Soranno, as owner of Sorrano's Gasco ("Gasco"), publicly challenged certain new regulations promulgated by the county and the air pollution district, speaking out at County Board of Supervisors meetings and initiating litigation to challenge the regulations. Subsequently, the air pollution district demanded certain documentation from Soranno, which Sorrano refused to provide on the grounds that the demand was an improper attempt at discovery related to a civil penalty action the county had filed against Gasco. The air pollution district then exercised its statutory authority and suspended Gasco's bulk plant permits, and a pollution control officer circulated a letter to Gasco's clients informing them of Gasco's permit suspension and of possible adverse impact on their own businesses.

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retaliatory animus and the prosecutor's independent decision, which is accorded presumptive regularity. *Id.* at 252, 263-66. *Hartman* does not apply to this case because the Court made a clear distinction between retaliatory-prosecution actions to which the additional pleading and proof requirements apply, and "ordinary" retaliation actions to which the requirements do not apply (i.e., where there is no independent prosecutorial action). *Id.* at 259-62; *accord Skoog*, 469 F.3d at 1233-34 (recognizing that *Hartman*'s absence of probable cause element applies to "a particular subcategory of retaliation claims: retaliatory prosecution claims"). This case involves an ordinary retaliation action and, therefore, *Hartman* is inapplicable.

Sorrano and Gasco brought an action under 42 U.S.C. § 1983 against the county, the air pollution district, and several officials on the grounds that the defendants suspended Gasco's petroleum bulk plant permits and discouraged its customers from doing business with Gasco in retaliation for Soranno's exercise of constitutionally protected speech and petition rights. We vacated the grant of summary judgment and held that: (1) the plaintiffs had protected rights in commenting on the conduct of government officials and in petitioning the government for redress of grievances, and (2) Soranno's protected expression was a substantial factor in the decision to suspend Gasco's permits. *Id.* at 1314-15. We based our finding that Sorrano's protected expression was a substantial factor in the air pollution district's decision on the timing of the district's suspension action and a phone call in which the pollution control officer intimated to Sorrano that he would "somehow get even" with Soranno for generating embarrassing publicity about the challenged regulations. *Id.* at 1315-16.

The present case closely resembles *Soranno's Gasco.* As discussed above, Kilkelly engaged in protected First Amendment activity by way of his petition for administrative review of agency decisions, lobbying efforts, advocacy related to interpretation of the building codes, and public statements criticizing the State employees. Assuming that CarePartners's version of the material facts is correct, as we must in the context of an interlocutory appeal of a qualified immunity decision, CarePartners has met its initial burden of showing that its speech was a substantial or

motivating factor behind the State employees' decision to take the actions described above. First, the timing of the State employees' investigation of CarePartners and the summary suspension and revocation of its license were suspiciously close in time to the administrative hearing on the Meridian facility and Kilkelly's lobbying efforts regarding the Lakewood facility. *See Soranno's Gasco,* 874 F.2d at 1316 (recognizing that the suspicious timing and nature of the permit suspension contributed to the finding that Soranno's protected expression was a substantial factor in the suspension decision). Second, the existence of a retaliatory intent is supported by Dale's declaration indicating that DSHS officials were "quickly losing patience" with Kilkelly, and that the Assistant Attorney General told Dale that Kilkelly was "known to the department." Third, the record, based on limited discovery conducted thus far, contains e-mails that suggest DSHS was planning to take action against Alderwood and Wenatchee before it conducted its follow-up inspections. Finally, the record indicates that DSHS may have been deliberately refusing to communicate with Kilkelly despite his expressed willingness to install a sprinkler system. In the context of an interlocutory appeal on qualified immunity, these facts indicate that CarePartners has demonstrated that Kilkelly's protected expression may well have been a substantial factor in the State employees' aggressive enforcement decisions.

The district court properly declined to determine whether the State *would* have made the decisions it did in the absence of Kilkelly's protected

speech and petition activity because issues of fact remained with regard to the State employees' motivations. *Id.* at 1316 ("[T]he potential section 1983 liability depends upon the defendants' motivation. This is a genuine issue of material fact and is therefore inappropriate for summary judgment.") (citation omitted). The district court provided, however, that once the parties conducted additional discovery they could file new motions for summary judgment. We may not make factual findings regarding the State employees' motivations, and thus leave this question for further proceedings in the district court.[8]

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[8] This conclusion is not altered by the State employees' thinly supported request that we accord some type of preclusive effect to an order of the Superior Court of Washington dismissing CarePartners's administrative appeal with prejudice. They argue that the dismissal of that appeal demonstrates that the validity of the licensing actions is a "verity," and thus the enforcement action *would* have occurred despite any retaliatory motive. The argument is not persuasive. First, the administrative appeal was not decided on the merits and the claim was not actually litigated, as the court dismissed the appeal with prejudice because CarePartners withdrew its appeal. *See Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 880 & n.5 (9th Cir. 2007). Second, the district court refused to consider the State employees' "res judicata" argument because it was first raised in a reply brief and CarePartners was unable to respond to the argument. We will not ordinarily consider an issue raised for the first time on appeal, and decline to do so here. *See Int'l Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir. 1985).

2. *Importation of the public concern requirement and the* Pickering *Balancing Test*

The State employees assert that two criteria applicable to the evaluation of a public employee's speech-based retaliation claims should apply generally to First Amendment retaliation claims by regulated entities: first, that the speech at issue address a matter of public concern; and, second, that even if that speech addresses a matter of public concern it survive what is known as the *Pickering* balancing test. They rely primarily on *Tennessee Secondary School Athletic Association v. Brentwood Academy,* 127 S. Ct. 2489 (2007), which they argue held that the public concern requirement and *Pickering* balancing test apply generally to the regulated entity context. In *Brentwood Academy,* the Court held that a state-sponsored high school athletic league could impose conditions on its member schools' coaches' speech–aimed at "hard-sell recruiting" of middle school children to high school teams–that were necessary to managing an efficient and effective league. *Id.* at 2495. As discussed below, however, *Brentwood Academy* is distinguishable. Moreover, the rationales underlying the "public concern" requirement and the *Pickering* balancing test in the public employee context do not support the extension of this analytical framework to the regulated entity context.

In the specific context of speech-based retaliation claims made by public employees, the Supreme Court has held that the "First Amendment's guarantee of freedom of speech

protects government employees from termination *because of* their speech on matters of public concern." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 675 (1996) (citing *Connick v. Myers*, 461 U.S. 138, 146 (1983)); *see also Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). Analysis of a government employee's speech-based retaliation claim is similar to speech-based retaliation claims by regulated entities–the employee must initially show that the conduct at issue was protected and that it was a substantial or motivating factor for the adverse action, with the burden then shifting to the government to demonstrate that it would have taken the same action in the absence of the protected conduct–but adds two additional criteria. *See Umbehr*, 518 U.S. at 675 (citing *Mt. Healthy*, 429 U.S. at 287); *Garcetti*, 547 U.S. at 418. First, the public employee's speech at issue must be on a matter of public concern, i.e., speech made as a private citizen "fairly considered as relating to any matter of political, social, or other concern to the community," as opposed to speech by an employee about matters of personal interest. *See Connick*, 461 U.S. at 146-48; *see also Umbehr*, 518 U.S. at 675-76. Second, even an adverse action based on protected speech "may be justified when legitimate countervailing government interests are sufficiently strong." *Umbehr*, 518 U.S. at 675.

This latter aspect, the "*Pickering* balancing test," recognizes that First Amendment rights of a government employee in retaliation claims depend

on the " 'balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' " *Umbehr*, 518 U.S. at 676 (alteration in original) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)); *see also Garcetti*, 547 U.S. at 418 ("A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.").[9]

The additional criteria for a government employee's retaliation claim based on First Amendment activity do not categorically apply to a claim by a regulated entity. The history, rationale, and limited nature of the public concern requirement and *Pickering* balancing test, as well as existing circuit precedent, do not support their application in the regulated entity context. In *Connick*, the Supreme Court discussed the public concern requirement with specific and limited reference to the field of public employee speech and explained that it was based on the need to balance government employees' speech rights with the government's needs as an employer. 461 U.S. at 142-44; *see also Thaddeus-X v. Blatter*, 175 F.3d 378, 390 (6th Cir.

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[9] In *Umbehr*, the Supreme Court extended this analytical framework to cover independent government contractors. 518 U.S. at 677, 685; *accord Alpha Energy Savers, Inc. v. Hansen*, 381 F.3d 917, 923 (9th Cir. 2004).

1999) (en banc) (per curiam) (noting, in discussing the origins of the public concern test, that "[t]he story of the public concern limitation is a story about the free speech of public employees").[10]

Moreover, we have already prescribed the framework for analyzing speech and petition-based retaliation claims by regulated entities, and that framework does not include the question of whether the speech was on a matter of public concern or use of the *Pickering* balancing test. *See Soranno's Gasco*, 874 F.2d at 1314-15.[11] Although the *Soranno's Gasco* court did not specifically address the public concern requirement or the *Pickering* balancing test, it surely was apprised, in 1989, of the approach that the Supreme Court had adopted in its public employee speech retaliation cases. *See e.g.*,

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[10] We note that the public concern requirement and the *Pickering* balancing test have their genesis in the Supreme Court's attempts to *expand*, not reduce, the public employees' speech rights. *See Connick*, 461 U.S. at 143-46. These criteria represent the culmination of years of decisions that whittled away the "unchallenged dogma . . . that a public employee had no right to object to conditions placed upon the terms of employment-including those which restricted the exercise of constitutional rights." *Id.* at 143. The Court's intent was to safeguard public employees' rights to speak on matters of public concern.

[11] Similarly, in *Beechwood Restorative Care Ctr. v. Leeds*, 436 F.3d 147, 151-52 (2d Cir. 2006), the Second Circuit discussed the standards to be used to evaluate a nursing home's claim that state and federal regulators retaliated against it because of its complaints, protests, and lawsuits regarding regulations, but did not mention the public concern requirement or the *Pickering* balancing test.

Connick, 461 U.S. 138 (decided in 1983); *Pickering*, 391 U.S. 563 (decided in 1968).

The rationales for the public concern requirement as well as the *Pickering* balancing test weigh against their application to retaliation claims by regulated entities. In discussing the public concern test, the Third Circuit stated:

> The "public concern" test was formulated by the Supreme Court in addressing speech restrictions placed by governmental entities on their own public employees. Regulation of public employee speech presented two features not present in other forms of speech control. First, acting as an employer, the government has some authority to impose conditions upon those who seek jobs, including conditions that limit the exercise of otherwise available constitutional rights. Second, "[w]hen someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her."

Eichenlaub v. Twp. of Indiana, 385 F.3d 274, 283 (3d Cir. 2004) (citations omitted).

The Fifth Circuit has similarly noted that, "[i]n general, courts have invoked two reasons for applying the [public concern requirement and the *Pickering* balancing] test outside of the employment context: [first,] that the relationship involved was analogous to an employer-employee relationship [; and, second,] that the principle underlying *Connick*

warranted its application," i.e., the need to balance between the interests of the employee, as citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *See Blackburn v. City of Marshall,* 42 F.3d 925, 932-34 (5th Cir. 1995) (collecting cases where public concern requirement was extended to cover relationships analogous to government employer-employee relationship). Here, the relationship between CarePartners, a licensee, and the State of Washington does not resemble an employment relationship, and CarePartners's grievances do not resemble ordinary workplace grievances.[12]

Other circuits have also cautioned against extending the criteria beyond the public employment context, noting the origins and limited nature of the public concern requirement and the *Pickering* balancing test. *See Jenkins v. Rock Hill Local Sch. Dist.*, 513 F.3d 580, 586-87 (6th Cir. 2008) (alleged retaliation by school board against student for mother's speech); *Van Deelen v. Johnson,* 497 F.3d 1151, 1156-57 (10th Cir. 2007) (declining to apply criteria to alleged retaliation against taxpayer for bringing tax assessment challenges); *Campagna v. Mass. Dep't of Envtl. Prot.*, 334 F.3d 150, 154-55 (1st Cir. 2003) (declining to apply criteria to alleged

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[12] In contrast, in *Havekost v. U.S. Department of the Navy*, 925 F.2d 316, 317-18 (9th Cir. 1991), we noted that the *Connick/Pickering* standards were not directly on point, but applied public employee standards to the retaliation claim of a grocery bagger licensed to work in a military facility where the speech at issue was "nothing more than a workplace grievance."

retaliation against state employee, who also was a private certified septic system inspector, for filing previous lawsuit against county); *Friedl v. City of New York*, 210 F.3d 79, 87 (2d Cir. 2000) (declining to apply criteria to alleged retaliation against prisoner for having sought public assistance benefits); *Vickery v. Jones*, 100 F.3d 1334, 1346 n.1 (7th Cir. 1996) (declining to apply criteria to alleged retaliation by Illinois State officials and Illinois Republican Party against applicant for appointment to a "temporary highway maintainer" position because of political affiliation). We find our colleagues' reasoning persuasive and accordingly do not apply the public concern requirement and *Pickering* balancing test to CarePartners's retaliation claim.

Finally, we distinguish *Brentwood Academy*, 127 S. Ct. 2489, upon which the State employees rely for their requested extension of the law governing First Amendment retaliation claims by public employees. *Brentwood Academy* involved the regulation of speech rights that the high schools at issue contracted away in exchange for participation in a private athletic league deemed by the Court to be a state actor. Where an entity specifically contracts with a government entity for a benefit which directly flows from some limitation of speech, a challenge to the contracted-for limitation raises concerns similar to the public employee context: whether the speech is on a matter of public concern, and whether the government has an employer-like interest in the controversy. Those concerns are not present here. Nothing in *Brentwood Academy* suggests that these additional criteria should be

applied to all entities that are to a greater or lesser extent regulated by a government. Rather, consistent with our colleagues from other circuits and with the shifting of burdens that occurs once a showing of protected activity has been made, we hold that the State employees have failed to show that their relationship with CarePartners is sufficiently analogous to the public employee context to allow the imposition of the additional criteria. We conclude that *Brentwood Academy* does not compel this court to extend the public employee retaliation analysis beyond its current moorings in this circuit.

B. Clearly established rights

Having established a constitutional violation based on the facts alleged by CarePartners, we next turn to the question of whether the First Amendment rights violated were "clearly established" at the time of the alleged violations, i.e., "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier*, 533 U.S. at 202 (citation and internal quotation marks omitted). "This inquiry . . . must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* at 201. However, the injured party "need not establish that the Defendants 'behavior had been previously declared unconstitutional.' " *Hydrick v. Hunter*, 500 F.3d 978, 989 (9th Cir. 2007) (quoting *Blueford v. Prunty*, 108 F.3d 251, 254 (9th Cir. 1997)). The dispositive inquiry is "whether it would be clear to a reasonable

[official] that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202.

As the district court properly concluded, the relevant law was clearly established at the time of the alleged violation. In *Soranno's Gasco*, decided in 1989, we held that it is unlawful for the government to deliberately retaliate against a citizen for exercising his right to comment on (and publicly criticize) government officials' actions and his right to access the courts and administrative appeals process for redress of grievances. 874 F.2d at 1314-15 (citing *Mt. Healthy*, 429 U.S. 274.) As discussed above, the facts in *Soranno's Gasco* closely resemble the facts in the present appeal–both cases involve a regulated entity claiming intentional retaliation by government officials because of the exercise of speech and petition rights. Notably, in discussing a qualified immunity defense, we stated that "[i]t could hardly be disputed that at the time of the permit suspension an individual had a clearly established right to be free of intentional retaliation by government officials based upon that individual's constitutionally protected expression." *Id.* at 1319. Accordingly, based on the allegations of CarePartners before the court on summary judgment, we conclude that it would have been "clear to a reasonable [official] that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Therefore, the First Amendment rights advanced by CarePartners were clearly established for the purpose of evaluating the State employees' qualified immunity defense.

The State employees argue, however, that the question of whether to apply a "matter of public concern" requirement from the public employee context to regulated entities' speech is unsettled and thus the law is not clearly established. They contend that *Soranno's Gasco* does not resolve the issue because the parties in that case did not raise the "public concern" argument that the State employees have raised here, and, therefore, the court made no determination on that more particularized question.

However, the assertion of an unsuccessful defense to a violation of a constitutional right does not render the right "unsettled" or not "clearly established." Notwithstanding the fact that the *Soranno's Gasco* court did not make a specific holding regarding the application of the "public concern" requirement and *Pickering* balancing test beyond the public employee context, that panel addressed a regulated entity's precise claim of retaliation by government officials as a result of the entity's owners' public comments and petition to the courts to challenge a regulatory act. The scope of the rights at issue here were particularized enough at the time of the violation to satisfy the *Saucier* test for "clearly established" law.

The State employees also argue that this court should not rely on *Soranno's Gasco* because that decision relied in part on a causation test from the public employee context, *Mt. Healthy*, 429 U.S. 274. Far from being persuasive, this tends to bolster the argument that the public concern should not be grafted onto the regulated entity context because the *Soranno's Gasco* court knew of the causation test and

yet decided not to apply it to the regulated entity's retaliation claim.

Finally, we reject any suggestion that the State employees could have believed, "reasonably but mistakenly," that their conduct did not violate a clearly established constitutional right. *Inouye*, 504 F.3d at 712 & n.6; *Skoog*, 469 F.3d at 1229. The speech and petition rights at issue have been clearly established in this circuit since 1989. At least at the summary judgment stage, absent some type of extraordinary showing that is not present here, a court could hardly find that the government officials "reasonably but mistakenly" believed that they could retaliate against a regulated entity and its owners for exercising their First Amendment rights.

IV. CONCLUSION

The district court correctly concluded that a grant of qualified immunity would be premature because CarePartners could potentially establish a prima facie case of retaliation given the opportunity to conduct full discovery. Taking CarePartners's allegations as true, it established that Kilkelly engaged in protected speech and petition activities, and that such activities may have been a substantial or motivating factor for the State employees' disparate enforcement action. Moreover, the State employees failed to show that the constitutional

rights at issue were not clearly established. Finally, we hold that the public concern requirement and *Pickering* balancing test do not apply to First Amendment retaliation claims in the regulated entity context. Accordingly, the district court's denial of summary judgment on qualified immunity is AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CAREPARTNERS LLC, et al, Plaintiffs, vs. PAT LASHWAY, et al, Defendants.	No. C05-1104RSL ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court on "Defendants' Memorandum in Support of Motion for Summary Judgment (*Rooker Feldman*)" (Dkt. #47) and "Defendants' Memorandum in Support of Motion for Summary Judgment (Qualified Immunity)" (Dkt. #40). Plaintiffs allege that defendants violated their constitutional rights in the course of summarily suspending the license of a boarding home operated by plaintiffs in 2003. Defendants move for summary judgment and argue that plaintiffs' claims are barred by the *Rooker-Feldman* doctrine, or alternatively, that they are entitled to qualified immunity.[1]

[1] Because this matter can be decided on the memoranda, declarations, and exhibits submitted by the parties, defendants' request for oral argument is DENIED.

I. FACTS

The following facts are either undisputed or, where a dispute exists, it is resolved in plaintiffs' favor. The State of Washington has licensed and regulated boarding homes since 1958.[2] RCW 18.20.030. As part of this regulatory responsibility, the State has instituted comprehensive boarding home rules regulating building construction, medical care, safety, and other details related to resident care. These rules are generally enforced by the Department of Social and Health Services ("DSHS"), but fire protection standards are established by the state Fire Marshal's Office, a subdivision of the Washington State Patrol. RCW 18.20.110, 18.20.130. In 2002 and 2003, DSHS and the Fire Marshal's Office began requiring boarding homes with more than two semi or non-ambulatory residents[3] to install fire sprinklers.

Plaintiff Joseph Kilkelly and his company CarePartners Management LLC own and/or manage a number of assisted living facilities in the State of Washington. This case centers primarily around the

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[2] Boarding homes provide housing, basic services, and assume general responsibility for the safety and well being of seven or more residents who reside there typically because age or disability has left them unable to fully care for themselves. RCW 18.20.020(1), (11). Boarding homes are also commonly referred to as "assisted living" centers.

[3] On a general level, both parties agree that the ambulatory status of the resident refers, in this context, to their ability to exit the building on their own accord in the event of an emergency. The parties disagree about how the term should be applied with regard to specific residents.

investigation by state officials of one of plaintiffs' facilities, Alderwood Assisted Living (the "Alderwood facility"), in 2003. The immediate dispute began in February, 2003, when deputy fire marshals conducted routine inspections of both the Alderwood facility and another boarding home operated by plaintiffs, Wenatchee Assisted Living (the "Wenatchee facility"). Following these inspections the Wenatchee facility was issued a violation notice for having too many semi and non-ambulatory residents in a boarding home without fire sprinklers. Declaration of C. Duane Van Beek (Dkt. #44) ("Van Beek Decl."), Ex. A. An inspection of the Alderwood facility, also in February, raised similar questions about whether it too had residents who were not sufficiently ambulatory to reside in a non-sprinklered facility. Declaration of Nancy Tyson (Dkt. #42) ("Tyson Decl.), Ex. E. In response to these inspections, Kilkelly sent a letter to the fire marshal on February 28, 2003 disputing the citation of the Wenatchee facility. Tyson Decl., Ex. D. In the letter, plaintiff argued that the marshal lacked the necessary expertise to make determinations of ambulatory capability and explained why he believed that both the Alderwood and Wenatchee facilities were in compliance with state regulations. Kilkelly sent a similar e-mail to a DSHS official on March 1, 2003. Tyson Decl., Ex. E.

On June 23, and 24, 2003, a deputy fire marshal, together with four boarding home licensing staff—most of whom were registered nurses—returned to the Alderwood and Wenatchee facilities to conduct joint inspections to evaluate residents and review health records to more accurately assess

residents' ambulatory status. Based on interviews, observations and a review of records, the inspectors concluded that 46 of the 52 residents of the Alderwood facility,[4] and 12 of the 48 residents of the Wenatchee facility were not fully ambulatory. In addition, inspectors also concluded that both facilities had flaws in their fire evacuation procedures. On June 27, 2003, the Alderwood facility had conditions imposed on its license and was ordered to provide a plan of correction within ten days. The conditions required: (1) all but two semi and non-ambulatory residents to be discharged within thirty days; (2) the remaining two non-ambulatory residents to be housed on the first floor; (3) the facility to contact the local fire department to discuss the level of risk to residents and evacuation plans within 24 hours; (4) the hiring of staff to conduct a 24-hour fire watch with no additional duties within 24 hours; and (5) the training of staff and residents on evacuation plans within seven days.[5] Tyson Decl., Ex. J. After several requests, the

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[4] Medicaid assessments for 31 of the 38 Medicaid residents indicated that they were semi or non-ambulatory and the Alderwood facility's own records identified 37 of the 52 residents requiring evacuation assistance.

[5] The inspection of the Wenatchee facility also resulted in the imposition of conditions on the facility's license. Tyson Decl., Ex. H. The most significant condition was the requirement that the facility discharge 10 of the 12 semi-ambulatory residents and move the two remaining semi-ambulatory residents to the first floor. Ultimately the Wenatchee facility submitted the required plan of correction and discharged nine semi-ambulatory residents (another passed away). Subsequently, a sprinkler system was installed and the facility was again permitted to admit semi and non-ambulatory residents.

Region 3 Regional Administrator and field manager agreed to meet with plaintiffs, plaintiffs' attorney and the administrator of the Alderwood facility on July 10, 2003 to discuss what progress had been made on the plan of correction. On July 11, 2003 state boarding home regulators met internally to discuss the situation. At that meeting, defendant Pat Lashway, the Director of Residential Care Services for DSHS, issued an order immediately suspending plaintiffs' Alderwood license on the ground that the facility's failure to comply with fire safety regulations presented an imminent danger to the residents of the home. Tyson Decl., Ex. K. The order also permanently revoked the Alderwood license and stopped the placement of new residents. Defendants contend that the decision to summarily suspend the Alderwood license was made because they were concerned that the Alderwood facility had not taken sufficient action to relocate semi and non-ambulatory residents and had not implemented the required fire watch properly. Tyson Decl. at p. 10.

In response to the order, plaintiffs took their story to the media, filed an immediate administrative appeal of the license suspension, revocation, and the stop placement order, and asked the Thurston County Superior Court for an emergency stay pending the appeal. The Superior Court granted a temporary ten-day stay and ordered the parties to present briefing and to engage in mediation. In the mediation, DSHS offered to rescind the licensing suspension and allow semi and non-ambulatory residents to remain at the Alderwood facility if plaintiffs agreed to install sprinklers and hire full-time fire fighters to patrol floors where semi and

non-ambulatory residents were housed. Tyson Decl., Ex. L. Though Mr. Kilkelly agreed to install sprinklers, he would not agree to hire firefighters pending installation, arguing that the financial cost of such a measure would be fatal to the business. It was on this issue that negotiations broke down.

On July 24, 2003, the Superior Court denied plaintiffs' motion for a stay. Declaration of Catherine Hoover (Dkt. #480) ("Hoover Decl."), Ex. E. Plaintiffs appealed the Superior Court's decision to the Washington State Court of Appeals. Again, both parties filed briefing on whether a stay should be issued. On August 3, 2003, the Court of Appeals also denied plaintiffs' motion for a stay and found: (1) that plaintiffs had failed to show a likelihood of prevailing on their administrative appeal; (2) there was a sufficient hazard to justify the emergency order; and (3) that the need for boarding home code enforcement outweighed any harm to plaintiffs. Hoover Decl., Ex. 1. Plaintiffs then proceeded with their administrative appeal. Plaintiffs moved for summary judgment and prevailed in September, 2005 after the administrative law judge concluded that there was no emergency to justify the summary suspension. That decision was subsequently reversed by the Board of Appeals, and an appeal of the reversal is currently pending before the Thurston County Superior Court.

In addition to his involvement in the licensing issues related to the Alderwood and Wenatchee facilities, plaintiff Kilkelly also was involved in other disputes with DSHS in 2002 and 2003. One such dispute involved the request for an administrative hearing to contest a $300 fine issued against

CarePartners' Meridian Hills Assisted Living facility. The administrative hearing on that appeal was held on January 27, 2003 and February 11, 2003. Plaintiff Kilkelly sought review of the initial decision in that matter on April 28, 2003. During the same period, Kilkelly was also seeking to acquire a boarding home license for an assisted living facility in Lakewood, Washington. As part of this effort, Kilkelly lobbied a number of DSHS officials and elected officials with the goal of challenging DSHS's interpretation of licensing rules. Declaration of Michael E. Tardif (Dkt. #41) ("Tardif Decl."), Ex. 3 (correspondence related to that lobbying effort).

II. DISCUSSION

A. Summary Judgment Standard

On a motion for summary judgment, the Court must "view the evidence in the light most favorable to the nonmoving party and determine whether there are any genuine issues of material fact." *Holley v. Crank*, 386 F.3d 1248, 1255 (9th Cir. 2004). All reasonable inferences supported by the evidence are to be drawn in favor of the nonmoving party. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002). "[I]f a rational trier of fact might resolve the issues in favor of the nonmoving party, summary judgment must be denied." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987).

B. *Rooker-Feldman*

Defendants contend that plaintiffs' claims should be dismissed under the *Rooker-Feldman* doctrine because the validity of the emergency

suspension has already been upheld in state court. Defendants substantially overstate the reach of *Rooker-Feldman*. As plaintiffs properly point out, the Supreme Court made it clear in *Exxon Mobile Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005) that *Rooker-Feldman* was confined to cases "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 284. Further, the Ninth Circuit has made it clear that, "where the federal plaintiff does not complain of a legal injury caused by a state court judgment, but rather of a legal injury caused by an adverse party, *Rooker-Feldman* does not bar jurisdiction." *Noel v. Hall*, 341 F.3d 1148, 1164 (9th Cir. 2003). Here plaintiffs' Section 1983 claims do not seek to undue an injury caused by the state court denial of the request for a stay. Rather, plaintiffs seek relief for actions taken by state officials in the course of suspending the Alderwood facility's license. The action is therefore not barred by *Rooker-Feldman*.[6]

C. Qualified Immunity

Section 1983 of the Civil Rights Act provides a federal cause of action against any person who, acting under color of state law, deprives another of their federal rights. The statute itself does not create substantive rights, but merely provides "a

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[6] Defendants raised the issue of res judicata for the first time in their reply memorandum. Because plaintiffs were not been [sic] given sufficient notice to respond to these arguments in their response brief, the Court will not consider defendants' res judicata arguments in this Order.

method for vindicating federal rights elsewhere conferred." *Graham v. Conner*, 490 U.S. 386, 393 (1989). In determining whether a defendant is entitled to qualified immunity, the Court must first consider whether "[t]aken in the light most favorable to the party asserting the injury . . . the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If no constitutional right would have been violated if the allegations were established, then no further inquiry is necessary. If a violation could be made out, the Court must then determine "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[7] *Id.* at 202.

1. Procedural Due Process

Plaintiffs allege that defendants deprived them of their procedural due process rights when the Alderwood facility's license was revoked "without first providing a full and complete hearing on all the issues." Complaint at ¶4.2. Defendants do not deny

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[7] In an effort to prevent constitutional law from stagnating, the Supreme Court insists that the trial court determine whether defendant's conduct violated a constitutional right before determining whether the constitutional right was clearly established at the time of plaintiff's injury. Without such a two-part analysis, individual rights would be frozen in time as each reviewing court simply determined whether or not defendant's conduct had been found unconstitutional in the past. By first evaluating the constitutional claim on its merits, constitutional rights may develop over time even if the defendant in a particular case is immune from suit because the right found to have been violated was not clearly established at the time he or she acted. If similar conduct should occur in the future, the earlier the finding that the conduct implicated a constitutional right would ensure that the later defendant would be held responsible and would not be entitled to qualified immunity.

that plaintiffs had a property interest in the license to operate the Alderwood facility. Nor do defendants deny that plaintiffs were deprived of this property interest as a result of the summary suspension. Thus neither party disputes that plaintiffs were entitled to due process of law. What is in dispute is whether plaintiffs were entitled to a "full and complete hearing" prior to the revocation of their license.

In general, the Due Process Clause requires that "an individual be given an opportunity for a hearing *before* he is deprived of any significant property right." *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1380 (9th Cir. 1990) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)) (emphasis in original). The Supreme Court, however, has "rejected the proposition that [due process] *always* requires the State to provide a hearing prior to the initial deprivation of property." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997) (quoting *Parratt v. Taylor*, 451 U.S. 527, 540 (1986)) (emphasis in original). "An important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard until after the initial deprivation." *FDIC v. Mallen*, 486 U.S. 230, 240 (1988).

To determine whether a pre-deprivation hearing was constitutionally required in this specific situation, the Court must balance three factors:

> First, the private interest that will be affected by the official action; second, the risk of an

> erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). Having considered these factors in the context of plaintiffs' challenge, and viewing the evidence in the light most favorable to plaintiffs, the Court finds that defendants did not violate the procedural due process rights of plaintiffs.

As an initial matter, the Court acknowledges that plaintiffs' interest was substantial. The summary revocation of plaintiffs' license resulted in the relocation of the overwhelming majority of the Alderwood facility's residents. This, in turn, had the effect of essentially putting the Alderwood facility out of business. With that in mind, the existence of a substantial private interest does not end the Court's inquiry. Though this interest weighs in favor of a pre-deprivation hearing, it is not determinative.

The Supreme Court has made it clear that even where the private interest affected by the official action is substantial, post-deprivation hearings can satisfy due process concerns when an important government interest is coupled with factors minimizing the risk of an erroneous deprivation. *See Mallen*, 486 U.S. at 243-44 (FDIC suspension of bank officer upheld despite lack of pre-deprivation hearing); *Barry v. Barchi*, 443 U.S. 55, 64-66 (1979) (summary suspension of horse trainer's license did not require pre-deprivation hearing despite substantial private interest at stake). The

important government interests at stake here, combined with the presence of factors minimizing the risk of erroneous deprivation, lead the Court to conclude that a pre-deprivation hearing was not constitutionally required in this instance.

The government has a strong interest in protecting vulnerable boarding home residents from fire hazards, particularly those who are semi or non-ambulatory. It is for this reason that the State created a mechanism whereby officials could immediately suspend the license of a boarding home operator if DSHS officials concluded that "a deficiency is an imminent threat to a resident's health, safety or welfare." Former WAC 388-78A-030(5) (1998), repealed by St. Reg. 03-16-047 (Sept. 1, 2004). The Court is "not in a position to second-guess that legislative determination." *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1318 (9th Cir. 1989) (upholding suspension of petroleum bulk permit without pre-deprivation hearing where state made legislative determination that immediate suspensions were "necessitated by the state's interest in enforcing its pollution control law."). Further, the Supreme Court in *Barry* held that the state's interest in preserving the integrity of the sport of horse racing was sufficiently important to justify a delay between the suspension of a trainer's license and the provision of a hearing. 443 U.S. at 64-66. The governmental interest in protecting vulnerable residents of boarding homes is at least as great.[8]

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[8] Plaintiffs attempt to minimize the government's interest in this case by questioning whether the residents of the Alderwood facility were

In evaluating the danger of erroneous deprivation, courts have given great weight to pre-deprivation determinations made by "an independent body" indicating that the deprivation in question was "not arbitrary." *Mallen*, 486 U.S. at 244. In *Mallen*, the Court concluded that an "ex parte finding of probable cause" in the form of an indictment of the suspended bank officer served to minimize the danger that the suspension was "baseless or unwarranted." *Id.* at 240-41. In *Gilbert* verification that a suspension of an employee following a drug-related arrest was "not unjustified" was provided by the arrest itself. 520 U.S. at 934 ("as with an indictment, the arrest and formal charges imposed upon respondent 'by an independent body demonstrat[e] that the suspension is not arbitrary.'"). In *Barry*, state officials relied on the statements of the testing official who maintained he followed prescribed testing procedures and determined that the trainer's horse was indeed drugged. Though this evidence was "untested and not beyond error," the Court concluded that it was "sufficiently reliable to satisfy constitutional requirements." 443 U.S. at 65. The Court went on to note that a post-deprivation hearing was the proper venue to "resolve questions of credibility and conflicts in the evidence." *Id.*

In this instance, the risk of erroneous deprivation is even less. Immediately after receiving notice of the summary revocation, plaintiffs applied

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actually in imminent harm. The Ninth Circuit, however, has made it clear that "the relevant inquiry is not whether a suspension should have been issued in this particular case, but whether the statutory procedure itself is incapable of affording due process." *Soranno's Gasco, Inc.*, 874 F.2d at 1318.

for and received a temporary stay from the Superior Court. This stay remained in place while both parties fully briefed the question of whether plaintiffs should be granted a permanent stay pending plaintiffs' administrative appeal. During that time, all residents were permitted to remain at the Alderwood facility. Ultimately the Superior Court denied the request for a stay and concluded (1) that plaintiffs had not demonstrated that they were likely to succeed on appeal, and (2) that the threat to public health, safety, or welfare was sufficiently serious to justify the agency action. Though the temporary stay was at that point lifted, plaintiffs immediately filed a new request for a permanent stay with the Court of Appeals. The Court of Appeals agreed with the Superior Court and found that the "fire hazard identified by the State Fire Marshal is a sufficient threat to the residents' welfare to justify the Department's actions." Hoover Decl. Ex. I. Unlike the individuals in the above cited cases, plaintiffs here had the opportunity to present at least a pared down challenge to the summary revocation to a court prior to the deprivation. At the very least these proceedings served the purpose of establishing that the summary revocation was "not arbitrary." *Mallen*, 486 U.S. at 240. At best, these proceedings reinforce DSHS's conclusions regarding the danger faced by the residents of the Alderwood facility. In such instances, the State need not delay an action to protect the safety of vulnerable citizens pending an adversarial hearing to resolve questions of factual disagreement between the parties. While such a hearing must be held "at a meaningful time and in a meaningful manner," a prompt post-

deprivation hearing can provide constitutionally sufficient process.[9] *Barry*, 443 U.S. at 66 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

Plaintiffs contend that this case presents issues similar to those in *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375 (9th Cir. 1990). In *Chalkboard*, the Ninth Circuit held that state officials were not entitled to qualified immunity when they summarily suspended a day care center's license without a pre-deprivation hearing in violation of plaintiffs procedural due process rights. That case, however, is quite different from the one presented here. Most importantly, the court there concluded that the "risk of error" was "considerable" because the case involved allegations of sexual abuse which required "delicate judgments depending on credibility of witnesses and assessment of conditions not subject to measurement." *Id.* at 1381. The court was careful to distinguish other cases where pre-deprivation hearings were not essential because "the factual issue to be determined" was susceptible to "reasonably precise measurement by external standards." *Id.* Here, the key factual determinations involved the ambulatory status of the residents, whether the facility had adequate fire sprinklers and the immediacy of the danger faced by semi and non-ambulatory residents living in a facility lacking fire sprinklers. Though the conclusions officials reached on these questions are not infallible, they are susceptible to reasonably

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[9] Plaintiffs do not contend that the post-deprivation administrative or legal proceedings they utilized after the revocation of the license were constitutionally flawed, and therefore the Court does not address the adequacy of such procedures here.

precise measurement by trained professionals and are not dependent on the credibility determinations that were at issue in *Chalkboard*.

Chalkboard is also unique in that state officials there made the decision to summarily revoke plaintiff's day care license by means other than those provided be state law. Under Arizona law, state officials were required to give notice to plaintiffs and seek a restraining order and injunction from a court prior to taking action to address conditions that presented harm to children. *Id.* at 1392. The defendants in *Chalkboard* disregarded those requirements and summarily suspended plaintiffs' license without providing any notice or opportunity for plaintiffs to be heard. *Id.* Here, state officials summarily revoked plaintiffs' license using powers granted to them by the legislature. The court in *Chalkboard* acknowledged that in such situations, the courts were "constrained to yield to legislative judgments regarding the threat to the public interest and the need for summary action." *Id.* Plaintiffs' procedural due process claim therefore fails as a matter of law, and as a result the Court need not reach the question of whether it would be clear to defendants that their conduct was unlawful.[10]

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[10] Plaintiffs also make a number of arguments related to inadequate notice. While it is true that plaintiffs were entitled to notice sufficient to enable them to prepare for a hearing in a meaningful way, plaintiffs have put forward no evidence to suggest that they were given insufficient notice to prepare for their post-deprivation administrative and court challenges.

2. Retaliation

Plaintiffs also argue that actions taken by defendants throughout the investigation and suspension process were substantially motivated by a desire to retaliate against plaintiff Kilkelly for his exercise of constitutionally protected rights of speech and to petition government. Such actions, they contend, violate their First Amendment rights. Defendants contend that they are entitled to qualified immunity because "there is no clearly established law stating that First Amendment retaliation claims are viable in the context of speech and 'petitions to government' made by regulated businesses as part of administrative proceedings." Defendants' Motion on Qualified Immunity at p. 18. Again, as a threshold matter, the Court must first determine whether the facts, if read in the light most favorable to plaintiffs, establish that a constitutional right has been violated.

The Court begins by noting that defendants' characterization of the constitutional violation at issue here is fundamentally flawed. In framing their qualified immunity argument, defendants present the question at issue here as "whether legal arguments made during administrative appeals are protected speech that can support claims for retaliation when the regulatory authority takes future action against a business." Motion on Qualified Immunity at p. 18. They answer this question in the negative and in doing so rely heavily on *Board of County Commissioner of Wabaunsee County v. Umbehr*, 518 U.S. 668 (1996) for the proposition that the law with regard to retaliation claims made by regulated businesses is not clearly

established and that even if it was, the speech in question would not be protected because it does not relate to issues of public concern.

The primary flaw in defendants' analysis is that they incorrectly attempt to export First Amendment standards specific to the public employee context to the situation presented here where non-employees allege that the government has retaliated against them as citizens for their speech. As the Third Circuit recently explained in another case involving a First Amendment retaliation claim made by a regulated business:

> [t]he 'public concern' test was formulated by the Supreme Court in addressing speech restrictions placed by governmental entities on their own public employees. Regulation of public employee speech presented two features not present in other forms of speech control. First, acting as an employer, the government has some authority to impose conditions upon those who seek jobs, including conditions that limit the exercise of otherwise available constitutional rights . . . Second, 'when someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.'

Eichenlaub v. Township of Indiana, 385 F.3d 274, 282-83 (3rd Cir. 2004) (citation omitted) (quoting *Waters v. Churchill*, 511 U.S. 661, 675 (1994). Plaintiffs are not government employees, nor does plaintiffs' relationship to the government trigger the

sort of interests that compelled the Supreme Court to draw a distinction between speech of private and public concern. As such, the question of whether plaintiffs' speech is of "public concern" is irrelevant to the retaliation claim at issue in this case.

In fact, the Ninth Circuit had made clear what standard is to be used in evaluating retaliation claims made by non-governmental employees in this context. *See Sorrano's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314-16 (9th Cir. 1989). In *Sorrano's Gasco* plaintiffs alleged that the local air pollution control district's decision to revoke its petroleum bulk use permit was motivated by a desire to retaliate against plaintiff Sorrano for his public criticism of, and filing of a lawsuit against, the defendants. The court found that Sorrano had a "protected interest in commenting on the actions of government officials" and "a right to petition the government for redress of grievances." *Id.* at 1314. The court also held that if plaintiffs could establish that the decision to suspend its permit was made because of Sorrano's exercise of these constitutionally protected rights, a First Amendment violation would be established and plaintiffs would be entitled to relief under Section 1983. *Id.* Once it was established that the speech in question was protected, the court looked to determine whether plaintiffs had made an initial showing that the protected conduct was a "substantial" or "motivating" factor in the defendants' decision. *Id.* Having concluded that a prima facie showing had been made, the court stated that the "burden shifts to the defendant to establish that it *would* have reached the same decision even in the absence of the protected conduct. *Id.* (emphasis added).

It is not enough to survive summary judgment for defendants to merely show that they *could* have made the same decision absent any retaliatory intent. *Id.* at 1316.

Plaintiffs identify five specific acts of protected speech that they believe led to the retaliation in question: (1) Kilkelly's pursuit of an administrative appeal of the fine levied against Meridian Hills Assisted Living; (2) Kilkelly's legislative lobbying efforts to acquire a license for the boarding home facility in Lakewood, Washington; (3) Kilkelly's advocacy related to his interpretation of the building codes which would have permitted the Alderwood facility to be grandfathered out of the sprinkler installation requirements; (4) Kilkelly's statement to the press after the license revocation on July 11, 2003; and (5) Kilkelly's pursuit of both administrative review and a court ordered stay of the summary revocation of his license.[11] The Court agrees with plaintiff that these actions and statements are protected by the First Amendment.

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[11] Defendants argue that the complaint only alleges a retaliation claim for speech related to the Meridian Hills administrative appeal and that all other retaliation claims should be disregarded because they are raised for the first time in response to a summary judgment motion. A quick reading of the complaint and plaintiffs' contention interrogatory responses indicates defendants are mistaken. In the complaint, plaintiffs allege that the retaliation was in response to Kilkelly "accessing the administrative appeals process in dealing with prior corrective action taken against another facility and his efforts to access the courts to challenge the administrative actions taken against the Alderwood facility in July/July [sic] 2003." Complaint ¶ 4.1. Further, plaintiffs provided an extensive explanation of their retaliation claims in their response to contention interrogatory number five, including discussion of Kilkelly's speech related to the Lakewood facility and his advocacy related to his understanding of the grandfathering issue. *See* Tardif Decl. Defendants had sufficient notice of the basis for plaintiffs' retaliation claim.

The next question is whether plaintiffs have put forward a prima facie showing that the decision to (1) target them for investigation; (2) summarily suspend and revoke the Alderwood facility's license; and (3) impose certain conditions during settlement negotiations was substantially motivated by a desire to retaliate against them for engaging in protected activities.[12] In support of this allegation, plaintiffs point to a number of pieces of evidence. First, they maintain that the timing of the investigation and summary suspension is suspicious because both actions came on the heels of the administrative hearing regarding the Meridian Hills facility and Kilkelly's political lobbying to obtain a license for the Lakewood facility. Plaintiffs also allege that during the course of negotiations state officials indicated that Kilkelly was "known" to the department and that Pat Lashway was "quickly losing patience with Joe." Declaration of Robin Dale (Dkt. #51) ("Dale Decl.") at p. 3. Further, plaintiffs have put forward some evidence indicating that other boarding home facilities inspected during the same time period were given more favorable treatment that allowed them to stay in business.

In the employment context, courts have held that circumstantial evidence created a genuine issue of material fact on the question of retaliatory motive

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[12] Defendants repeatedly argue that any speech made on or after July 11, 2003 cannot form the basis of a retaliation claim, because the suspension of plaintiffs' license could not have been in retaliation for speech made after the suspension was ordered. Plaintiffs' retaliation claims, however, are not limited to simply the license suspension, but also include what plaintiffs characterize as retaliatory behavior during settlement negotiations.

when a plaintiff produces evidence of "proximity in time between the protected action and the allegedly retaliatory" action. *Keyser v. Sacramento City Unified Sch. Dist.*, 265 F.3d 741, 744 (9th Cir. 2001). The court in Keyser also held that a genuine issue of material fact could be created when evidence is submitted that the defendant "expressed opposition" to the speech in question. *Id.* Finally, a genuine issue of material fact has also been found when evidence has been produced indicating that the proffered explanation for the act in question was "false and pretextual." *Id.*

Though plaintiffs' evidence at this point is not substantial and may not be sufficient on its own to proceed to trial, for the purposes of evaluating defendants' qualified immunity defense, the Court concludes that plaintiffs could potentially make out a prima facie case of unconstitutional retaliation if given the opportunity to conduct full discovery. Once the discovery process is complete, however, the Court will again entertain motions for summary judgment. At that point defendants can also attempt to establish that they would have reached the same decision regardless of any potential retaliatory motive. *See Sorrano's Gasco, Inc. v. Morgan*, 874 F.2d at 1316.

Having determined that, if all disputed facts are taken in the light most favorable to plaintiffs, plaintiffs could establish that defendants violated First Amendment rights, the Court must determine whether the right allegedly violated was clearly established at the time defendants acted. *Saucier v. Katz*, 533 U.S. at 202. Because it was clearly unlawful in 2003 to deliberately retaliate against a

citizen's exercise of his right to comment on the actions of government officials or exercise his right to access the courts and the administrative appeals process, defendants are not entitled to qualified immunity on this claim. *See Sorrano's Gasco, Inc. v. Morgan*, 874 F.2d at 1314-16.

3. Substantive Due Process

Plaintiffs also allege that "[d]efendants [sic] actions were an intentional abuse of power violative of the substantive components of the due process clause of the Fourteenth Amendment." Complaint ¶ 4.4. As plaintiffs themselves acknowledge, however, the Supreme Court has held that substantive due process cannot supply the basis for a Section 1983 claim if the challenged governmental conduct is prohibited by another, more specific, constitutional right. *Graham v. Connor*, 490 U.S. 386, 394-95 (1989); *see also Armedariz v. Penman*, 75 F.3d 1311, 1318 (9th Cir. 1996) ("Even if the City's alleged conduct was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare,' . . . the plaintiffs' substantive due process claim fails because it is preempted by other constitutional claims."). Here, the conduct challenged is more than adequately addressed by plaintiffs' procedural due process and first amendment claims. As a result, plaintiffs' substantive due process claim fails as a matter of law.

4. Constitutional Allegations Not Included In Complaint

Plaintiffs have also raised a vagueness claim and an equal protection claim for the first time in

response to defendants' summary judgment motion. These claims are not included in either the complaint or plaintiffs' contention interrogatory responses. This is troubling given that Judge Robart granted defendants' motion for a more definite statement over a year ago to avoid this very problem. *See* Dkt. #9 ("trial courts must resolve immunity questions at the earliest possible stage of litigation in order to protect defendants from potentially unnecessary and burdensome discovery proceedings."). In that Order, defendants were granted permission to propound contention interrogatories that would enable them to determine the precise scope of the constitutional rights at issue so that qualified immunity issues could be resolved promptly. When asked in those contention interrogatories what specific constitutional violations were being alleged, plaintiffs answered as follows:

> With respect to each plaintiff, please note that the federally protected rights are all rights referenced within plaintiff's compliant, [sic] inclusive of plaintiff's Fourteenth Amendment right to procedural due process prior to the deprivation of his property interest in the license to operate Alderwood Assisted Living; the First Amendment rights to freedom of speech and petition; and rights relative to substantive due process, which generally speaking and discussed below, is predicated on the notion that the government cannot engage in arbitrary capricious and intentionally abusive conduct.

Tardif Decl. at p. 7. Plaintiffs submitted these responses on February 3, 2006. They have made no

effort since either to amend their complaint or to amend their previous interrogatory responses as they are obliged to do under Federal Rule of Civil Procedure Rule 26(e)(2). As such, plaintiffs are limited to those claims made in their complaint.

III. CONCLUSION

For all the foregoing reasons, defendants' motion for summary judgment on *Rooker-Feldman* (Dkt. #47) is DENIED. Defendants' motion for summary judgment on qualified immunity (Dkt. #40) is GRANTED in part and DENIED in part.

Dated this 26th day of January, 2007

/s/
Robert S. Lasnik
United States District Judge

[*Handwritten Order*]

SUPERIOR COURT OF WASHINGTON IN AND FOR THURSTON COUNTY	
CAREPARTNERS MANAGEMENT, LLC, d/b/a Alderwood Assisted Living Plaintiff/Petitioner, vs. Washington State Dept of Social and Health Services Defendant/Respondent.	NO. 06-2-00422-9 ORDER

This matter came before the Court on Care Partners' Petition for Judicial Review. Care Partners has withdrawn its administrative appeal, and the licensing actions of the Department of Social and Health Services at issue in this matter are deemed final and not subject to further judicial review under the Administrative Procedure Act, Chapter 34.05 RCW.

Therefore, this matter is dismissed with prejudice.

DATE: *5-18-07*

/s/Gary R. Tabor
Judge

Presented by:

/s/ Catherine R. Hoover #22049
Assistant Attorney General
Attorneys for Department of
Social and Health Services

/s/ Paul Lindenmuth
for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CAREPARTNERS MANAGEMENT LLC, dba ALDERWOOD ASSISTED LIVING and WENATCHEE ASSISTED LIVING, Petitioners, v. WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES and DENNIS BRADDOCK, Director, WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES Respondents.	No. 30646-8-II RULING DENYING STAY

FILED
COURT OF APPEALS
DIVISION II

03 JUL 29 PM 3: 17
STATE OF WASHINGTON
BY /s/
Deputy

CarePartners Management LLC (CarePartners) moves to stay the Summary Suspension, License Revocation and Stop Placement Order issued by the Department of Social and Health Services regarding the Alderwood Assisted Living facility, pending its appeal of those orders. This court denies the motion for stay.

On June 27, 2003, the Department issued a Statement of Deficiencies regarding the Alderwood facility, which required Alderwood to discharge all semi-ambulatory and non-ambulatory residents by July 27, 2003, and which required the staffing of designated firewatchers at all times until that date. CarePartners filed an administrative appeal with the

Office of Administrative Hearings. On July 11, 2003, the Department issued the Summary Suspension, License Revocation and Stop Placement Order, which required the Alderwood facility to discharge all its semi-ambulatory and non-ambulatory residents by July 14, 2003.

CarePartners filed a petition for review in superior court and moved for an emergency stay. The court took the motion for stay under advisement and ordered that the status of the Alderwood facility remain at status quo pending its decision on July 24, 2003. In an oral ruling, the court denied the motion for stay on July 24, 2003, ruling that CarePartners had not met its burden for a stay under RCW 34.05.550(3).

At 4:55 P.M. on Friday, July 25, 2003, CarePartners filed a notice of discretionary review and moved for an emergency stay pending appeal, under RAP 8.1(b)(3), RAP 8.3 and RAP 17.4(b).[1] A commissioner of this court directed that the Department file its response to the motions by noon on Tuesday, July 29, 2003. The Department timely filed its response.

To obtain a stay of the Summary Suspension, License Revocation and Stop Placement Order, CarePartners must "demonstrate that debatable issues are presented on appeal." RAP 8.1(b)(3)(i). If so, then this court must consider the injury that CarePartners would suffer if a stay is not granted

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[1] On July 29, 2003, CarePartners filed a motion to amend its motion for emergency stay, informing the court that the Department had relocated all but five residents since the superior court denied its motion for stay on July 24, 2003.

against the injuries that the Department would suffer if a stay is granted. RAP 8.1(b)(3)(ii).

This court applies a sliding scale under which the greater the injury the moving party would suffer if a stay is not granted, the lesser the showing of a debatable issue need be. *Boeing Co. v. Sierracin Corp.*, 43 Wn. App. 288, 291 (1986), *reversed on other grounds,* 108 Wn.2d 38 (1987). If the fruits of an appeal would be totally destroyed in the absence of a stay, then a stay should be granted, unless the appeal is totally devoid of merit. *Boeing Co.*, 43 Wn. App. at 291.

But the superior court's, and this court's, authority to grant a stay of the Department's action is limited by RCW 34.05.550(3), which provides:

> If judicial relief is sought for a stay or other temporary remedy from agency action based on public health, safety, or welfare grounds the court *shall not grant* such relief unless the court finds that:
>
> (a) The applicant is likely to prevail when the court finally disposes of the matter;
>
> (b) Without relief the applicant will suffer irreparable injury;
>
> (c) The grant of relief to the applicant will not substantially harm other parties to the proceedings; and
>
> (d) The threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances.

RCW 34.05.550(3) (emphasis added).

The superior court concluded that CarePartners had not met its burden as to (a) and (d) above. CarePartners argues that the court erred in both regards. It contends it is likely to prevail on appeal because the Department's decision conflicts with provisions of the Washington State Fire Code that permit semi-ambulatory and non-ambulatory residents to reside in the Alderwood facility even though it has no sprinkler system. It also contends that because the Alderwood facility complies with the fire code, the threat to the residents' welfare is not sufficiently serious to justify forcing the residents to relocate to other facilities, some of which may not have sprinkler systems either.

The Department responds that CarePartners is not likely to prevail on appeal because the Department's decision was consistent with the State Fire Marshal's conclusion that the Alderwood facility, given the number of semi-ambulatory and non-ambulatory residents and given the lack of a sprinkler system, constitutes a fire hazard. It also responds that the fire hazard is a sufficient threat to the residents' welfare to justify its decision to relocate the semi-ambulatory and non-ambulatory residents.

This court agrees with the superior court's findings that CarePartners failed to meet its substantial burden, under RCW 34.05.550(3), for obtaining a stay of the Department's actions. Given the consistent positions of the Department and the State Fire Marshal, CarePartners is not likely to prevail on appeal that the Department's decision conflicts with the Washington State Fire Code. So CarePartners fails to meet its burden under

RCW 34.05.550(3)(a). And the fire hazard identified by the State Fire Marshal is a sufficient threat to the residents' welfare to justify the Department's actions. So CarePartners fails to meet its burden under RCW 34.05.550(3)(d).

Even assuming CarePartners presents debatable issues on appeal, this court must "compare the injury that would be suffered by the moving party if a stay were not imposed with the injury that would be suffered by the nonmoving party if a stay were imposed." RAP 8.1(b)(3)(ii). If a stay is not imposed, the semi-ambulatory and non-ambulatory residents of the Alderwood facility, who comprised 46 of the facility's 52 residents at the time of the summary suspension, would have to be relocated, and the facility would likely have to close. If a stay is imposed, the Department will be deterred from enforcing its mandate to protect semi-ambulatory and non-ambulatory residents from danger. This court concludes that the injury the Department would suffer through the granting of a stay is greater than the injury that CarePartners will suffer through the denial of a stay. Accordingly it is hereby

ORDERED that CarePartners' motion for emergency stay of the Summary Suspension, License Revocation and Stop Placement Order pending appeal, under RAP 8.1(b)(3), RAP 8.3 and RAP 17.4(b), is denied.

DATED this 29th day of July, 2003.

/s Eric B. Schmidt
Eric B. Schmidt
Court Commissioner

cc: Kathleen D. Benedict
Robin Dale
Catherine Hoover
Hon. Richard D. Hicks
Thurston County Superior Court
Cause Number: 03-2-01366-5

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
NOV 10 2008
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CAREPARTNERS LLC, limited liability corporation under the laws of the State of Washington doing business as Alderwood Assisted Living; CAREPARTNERS MANAGEMENT, limited liability corporation under the Laws of the State of Washington doing business as Alderwood Assisted Living; JOSEPH KILKELLY and LAURA KILKELLY, owners of CarePartners, LLC, individually and on behalf of their marital community,

Plaintiffs – Appellees,

v.

PAT LASHWAY, Director of Residential Care of Services for the Washington State Department of Social and Health Services (DSHS) in her individual capacity; NANCY TYSON Boarding Home Enforcement Officer, for

No. 07-35125

D.C. No. CV-05-01104-RSL
Western District of Washington, Seattle

ORDER

Residential Care Services and Aging Adult Services for DSHS, in her individual capacity; JOYCE STOCKWELL, an employee of DSHS in her individual capacity; ROBERT MCCLINTOCK, Regional Administrator for DSHS in his individual capacity also known as Bob McClintock; JULIE LORD, Licensing Field Manager for Residential Care Services for DSHS in her individual capacity; KATHRYN WEBB, Lead Field Inspector for Residential Care Services for DSHS in her individual capacity; MARY CORSO, formerly the Fire Marshal for the State of Washington in her individual capacity; ROGER WOODSIDE, Assistant State Fire Marshal for the State of Washington in his individual capacity; ED BORGATTI, Chief Deputy State Fire Marshal for the State of Washington in his individual capacity; MICHAEL STURGEON, Deputy Fire Marshal for the State of Washington in his individual capacity,

Defendants – Appellants.

Before: FERNANDEZ and CALLAHAN, Circuit Judges, and GONZALEZ,* District Judge.

Judge Fernandez votes to deny the petition for rehearing and recommends denial of the petition for rehearing en banc. Judge Callahan votes to deny the petition for rehearing and the petition for rehearing en banc. Chief Judge Gonzalez votes to deny the petition for rehearing and recommends denying the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on the petition. Accordingly, the petition for rehearing and the petition for rehearing en banc are DENIED.

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*The Honorable Irma E. Gonzalez, Chief United States District Judge for the Southern District of California, sitting by designation.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CAREPARTNERS LLC, et al, Plaintiffs, vs. PAT LASHWAY, et al, Defendants.	No. C05-1104RSL ORDER GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION

This matter comes before the Court on defendants' "Motion for Reconsideration/ Clarification" (Dkt. #117). Though the Court already issued its order on summary judgment, defendants ask the Court to clarify its ruling on a motion to strike contained in defendants' reply memorandum on summary judgment. Defendants' Reply at pp. 8-9 (Dkt. #113). The first statement defendants seek to strike is contained on page 23, lines 14-17 of Joseph Kilkelly's declaration:

> It was generally known, that although legislation was being sought, that the legislature had rejected such efforts and it its stead had put into place a grant program where qualified boarding homes could receive some funding towards the retrofitting of facilities with sprinkler systems.

Declaration of Joseph P. Kilkelly (Dkt. #54). The other statement is contained on page 49, lines 1-9 of the same declaration:

> Attached hereto as Exhibit No. 30 is a matrix of three similarly situated boarding homes and the treatment provided to them compared to Alderwood. In addition, attached hereto, as Exhibit No. 31, are my notes with respect to my discussions with regard to the actions of Department of Social and Health Services and the Washington State Fire Marshal's Office outlining the treatment provided to these other providers. The findings and conditions are materially the same as Alderwood; but in each case each facility was allowed to continue to operate, the findings were not treated as an emergency, the residents were allowed to stay in their homes, and the owners were allowed adequate time to install sprinkler systems (taking up to six months to install in some cases).

Id. Neither the statements or the exhibits referenced by defendants in their motion to strike are based on personal knowledge and as such these statements and exhibits were not considered by the Court in its January 26, 2007 Order (Dkt. #116).[1] To the extent that defendants' motion for reconsideration seeks to

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[1] The Court notes that plaintiffs did provide other documentation regarding the State's treatment of other boarding home facilities aside from the statements and exhibits that are the focus of defendants' motion to strike. *See, e.g.*, Declaration of Paul A. Lindenmuth (Dkt. #64), Exs. 43, 47, 51-58.

clarify the Court's January 26, 2007 Order, both its motion to strike this material and its motion for reconsideration are GRANTED.

DATED this 24th day of May, 2007.

/s/
Robert S. Lasnik
United States District Court

U.S. Const. art. IV, § 1

FAITH AND CREDIT AMONG STATES. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

U.S. Const. amend. I

FREEDOM OF RELIGION, OF SPEECH, AND OF THE PRESS. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Const. amend. V

RIGHTS OF ACCUSED IN CRIMINAL PROCEDINGS. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV

§ 1 CITIZENSHIP RIGHTS NOT TO BE ABRIDGED BY STATES. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

§ 2 APPORTIONMENT OF REPRESENTATIVES IN CONGRESS. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridges, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

§ 3 PERSONS DISQUALIFIED FROM HOLDING OFFICE. No person shall be a senator or representative in congress, or elector of president

and vice president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But congress may by a vote of two-thirds of each house, remove such disability.

§ 4 WHAT PUBLIC DEBTS ARE VALID. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

§ 5 POWER TO ENFORCE THIS ARTICLE. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Wash. Rev. Code § 18.20.010 (2002)

Purpose. The purpose of this chapter is to provide for the development, establishment, and enforcement of standards for the maintenance and operation of boarding homes, which, in the light of advancing knowledge, will promote safe and adequate care of the individuals therein. It is further the intent of the legislature that boarding homes be available to meet the needs of those for whom they care by recognizing the capabilities of individuals to direct their self-medication or to use supervised self-medication techniques when ordered and approved by a physician licensed under chapter 18.57 or 18.71 RCW or a podiatric physician and surgeon licensed under chapter 18.22 RCW.

The legislature finds that many residents of community-based long-term care facilities are vulnerable and their health and well-being are dependent on their caregivers. The quality, skills, and knowledge of their caregivers are often the key to good care. The legislature finds that the need for well-trained caregivers is growing as the state's population ages and residents' needs increase. The legislature intends that current training standards be enhanced.

Wash. Rev. Code § 18.20.020(1), (2), (7) (2003)

Definitions. As used in this chapter:

(1) "Boarding home" means any home or other institution, however named, which is advertised, announced, or maintained for the express or implied purpose of providing board and

domiciliary care to seven or more residents after July 1, 2000. However, a boarding home that is licensed to provide board and domiciliary care to three to six residents on July 1, 2000, may maintain its boarding home license as long as it is continually licensed as a boarding home. "Boarding home" shall not include facilities certified as group training homes pursuant to RCW 71A.22.040, nor any home, institution or section thereof which is otherwise licensed and regulated under the provisions of state law providing specifically for the licensing and regulation of such home, institution or section thereof. Nor shall it include any independent senior housing, independent living units in continuing care retirement communities, or other similar living situations including those subsidized by the department of housing and urban development.

(2) "Person" means any individual, firm, partnership, corporation, company, association, or joint stock association, and the legal successor thereof.

* * * * *

(7) "Resident" means an individual who: Lives in a boarding home, including those receiving respite care; is not related by blood or marriage to the operator of the boarding home; and by reason of age or disability, receives domiciliary care provided either directly or indirectly by the boarding home.

Wash. Rev. Code § 18.20.030 (2003)

License required. (1) After January 1, 1958, no person shall operate or maintain a boarding home as defined in this chapter within this state without a license under this chapter.

(2) A boarding home license is not required for the housing, or services, that are customarily provided under landlord tenant agreements governed by the residential landlord-tenant act, chapter 59.18 RCW, or when housing nonresident individuals who, without ongoing assistance from the boarding home, initiate and arrange for services provided by persons other than the boarding home licensee or the licensee's contractor. This subsection does not prohibit the licensee from furnishing written information concerning available community resources to the nonresident individual or the individual's family members or legal representatives. The licensee may not require the use of any particular service provider.

(3) Residents receiving domiciliary care, directly or indirectly by the boarding home, are not considered nonresident individuals for the purposes of this section.

(4) A boarding home license is not required for emergency assistance when that emergency assistance is not provided on a frequent or routine basis to any one nonresident individual and the nonresident individual resides in independent senior housing, independent living units in continuing care retirement communities, independent living units having common ownership with a licensed boarding

home, or other similar living situations including those subsidized by the department of housing and urban development.

Wash. Rev. Code § 18.20.040 (2000)

Application for license. An application for a license shall be made to the department upon forms provided by the department and shall contain such information as the department reasonably requires, which shall include affirmative evidence of ability to comply with such rules as are lawfully adopted by the department.

Wash. Rev. Code § 18.20.050 (2002)

Licenses – Issuance — Renewal – Provisional licenses — Fees — Display – Surrender, relinquishment. Upon receipt of an application for license, if the applicant and the boarding home facilities meet the requirements established under this chapter, the department shall issue a license. If there is a failure to comply with the provisions of this chapter or the standards and rules adopted pursuant thereto, the department may in its discretion issue to an applicant for a license, or for the renewal of a license, a provisional license which will permit the operation of the boarding home for a period to be determined by the department, but not to exceed twelve months, which provisional license shall not be subject to renewal. At the time of the application for or renewal of a license or provisional license the licensee shall pay a license fee as established by the department under RCW

43.20B.110. All licenses issued under the provisions of this chapter shall expire on a date to be set by the department, but no license issued pursuant to this chapter shall exceed twelve months in duration. However, when the annual license renewal date of a previously licensed boarding home is set by the department on a date less than twelve months prior to the expiration date of a license in effect at the time of reissuance, the license fee shall be prorated on a monthly basis and a credit be allowed at the first renewal of a license for any period of one month or more covered by the previous license. All applications for renewal of a license shall be made not later than thirty days prior to the date of expiration of the license. Each license shall be issued only for the premises and persons named in the application, and no license shall be transferable or assignable. Licenses shall be posted in a conspicuous place on the licensed premises.

A licensee who receives notification of the department's initiation of a denial, suspension, nonrenewal, or revocation of a boarding home license may, in lieu of appealing the department's action, surrender or relinquish the license. The department shall not issue a new license to or contract with the licensee, for the purposes of providing care to vulnerable adults or children, for a period of twenty years following the surrendering or relinquishment of the former license. The licensing record shall indicate that the licensee relinquished or surrendered the license, without admitting the violations, after receiving notice of the department's initiation of a denial, suspension, nonrenewal, or revocation of a license.

Wash. Rev. Code § 18.20.090 (2002)

Rules, regulations, and standards. The department shall adopt, amend, and promulgate such rules, regulations, and standards with respect to all boarding homes and operators thereof to be licensed hereunder as may be designed to further the accomplishment of the purposes of this chapter in promoting safe and adequate care of individuals in boarding homes and the sanitary, hygienic and safe conditions of the boarding home in the interest of publish health, safety, and welfare.

Wash. Rev. Code § 18.20.110 (2003)

Inspection of boarding homes–Approval of changes or new facilities. The department shall make or cause to be made, at least every eighteen months with an annual average of fifteen months, an inspection and investigation of all boarding homes. However, the department may delay an inspection to twenty-four months if the boarding home has had three consecutive inspections with no written notice of violations and has received no written notice of violations resulting from complaint investigation during that same time period. The department may at any time make an unannounced inspection of a licensed home to assure that the licensee is in compliance with this chapter and the rules adopted under this chapter. Every inspection shall focus primarily on actual or potential resident outcomes, and may include an inspection of every part of the premises and an examination of all records (other than financial records), methods of administration, the general and

special dietary, and the stores and methods of supply. Following such an inspection or inspections, written notice of any violation of this law or the rules adopted hereunder shall be given to the applicant or licensee and the department. The department may prescribe by rule that any licensee or applicant desiring to make specified types of alterations or additions to its facilities or to construct new facilities shall, before commencing such alteration, addition, or new construction, submit plans and specifications therefor to the agencies responsible for plan reviews for preliminary inspection and approval or recommendations with respect to compliance with the rules and standards herein authorized.

Wash. Rev. Code § 18.20.130 (2002)

Fire protection—Duties of chief of the Washington state patrol. Standards for fire protection and the enforcement thereof, with respect to all boarding homes to be licensed hereunder, shall be the responsibility of the chief of the Washington state patrol, through the director of fire protection, who shall adopt such recognized standards as may be applicable to boarding homes for the protection of life against the cause and spread of fire and fire hazards. The department, upon receipt of an application for a license, shall submit to the chief of the Washington state patrol, through the director of fire protection, in writing, a request for an inspection, giving the applicant's name and the location of the premises to be licensed. Upon receipt of such a request, the chief of the Washington state patrol, through the director of fire protection, or his or her deputy, shall make an

inspection of the boarding home to be licensed, and if it is found that the premises do not comply with the required safety standards and fire rules as adopted by the chief of the Washington state patrol, through the director of fire protection, he or she shall promptly make a written report to the boarding home and the department as to the manner and time allowed in which the premises must qualify for a license and set forth the conditions to be remedied with respect to fire rules. The department, applicant, or licensee shall notify the chief of the Washington state patrol, through the director of fire protection, upon completion of any requirements made by him or her, and the chief of the Washington state patrol, through the director of fire protection, or his or her deputy, shall make a reinspection of such premises. Whenever the boarding home to be licensed meets with the approval of the chief of the Washington state patrol, through the director of fire protection, he or she shall submit to the department a written report approving same with respect to fire protection before a full license can be issued. The chief of the Washington state patrol, through the director of fire protection, shall make or cause to be made inspections of such homes at least annually.

In cities which have in force a comprehensive building code, the provisions of which are determined by the chief of the Washington state patrol, through the director of fire protection, to be equal to the minimum standards of the code for boarding homes adopted by the chief of the Washington state patrol, through the director of fire protection, the chief of the fire department, provided the latter is a paid chief of a paid fire department, shall make the inspection

with the chief of the Washington state patrol, through the director of fire protection, or his or her deputy, and they shall jointly approve the premises before a full license can be issued.

Wash. Rev. Code § 18.20.190 (2003)

Department response to noncompliance or violations. (1) The department of social and health services is authorized to take one or more of the actions listed in subsection (2) of this section in any case in which the department finds that a boarding home provider has:

(a) Failed or refused to comply with the requirements of this chapter or the rules adopted under this chapter;

(b) Operated a boarding home without a license or under a revoked license;

(c) Knowingly, or with reason to know, made a false statement of material fact on his or her application for license or any data attached thereto, or in any matter under investigation by the department; or

(d) Willfully prevented or interfered with any inspection or investigation by the department.

(2) When authorized by subsection (1) of this section, the department may take one or more of the following actions:

(a) Refuse to issue a license;

(b) Impose reasonable conditions on a license, such as correction within a specified time, training, and limits on the type of clients the provider may admit or serve;

(c) Impose civil penalties of not more than one hundred dollars per day per violation;

(d) Suspend, revoke, or refuse to renew a license;

(e) Suspend admissions to the boarding home by imposing stop placement; or

(f) Suspend admission of a specific category or categories of residents as related to the violation by imposing a limited stop placement.

(3) When the department orders stop placement or a limited stop placement, the facility shall not admit any new resident until the stop placement or limited stop placement order is terminated. The department may approve re-admission of a resident to the facility from a hospital or nursing home during the stop placement or limited stop placement. The department shall terminate the stop placement or limited stop placement when: (a) The violations necessitating the stop placement or limited stop placement have been corrected; and (b) the provider exhibits the capacity to maintain correction of the violations previously found deficient. However, if upon the revisit the department finds new violations that the department reasonably believes will result in a new stop placement or new limited stop placement, the

previous stop placement or limited stop placement shall remain in effect until the new stop placement or new limited stop placement is imposed.

(4) After a department finding of a violation for which a stop placement or limited stop placement has been imposed, the department shall make an on-site revisit of the provider within fifteen working days from the request for revisit, to ensure correction of the violation. For violations that are serious or recurring or uncorrected following a previous citation, and create actual or threatened harm to one or more residents' well-being, including violations of residents' rights, the department shall make an on-site revisit as soon as appropriate to ensure correction of the violation. Verification of correction of all other violations may be made by either a department on-site revisit or by written or photographic documentation found by the department to be credible. This subsection does not prevent the department from enforcing license suspensions or revocations. Nothing in this subsection shall interfere with or diminish the department's authority and duty to ensure that the provider adequately cares for residents, including to make departmental on-site revisits as needed to ensure that the provider protects residents, and to enforce compliance with this chapter.

(5) RCW 43.20A.205 governs notice of a license denial, revocation, suspension, or modification. Chapter 34.05 RCW applies to department actions under this section, except that orders of the department imposing license suspension, stop placement, limited stop placement, or conditions for continuation of a license are

effective immediately upon notice and shall continue pending any hearing.

(6) For the purposes of this section, "limited stop placement" means the ability to suspend admission of a specific category or categories of residents.

Wash. Rev. Code § 34.05.467 (2002)

Stay. A party may submit to the presiding or reviewing officer, as is appropriate to the stage of the proceeding, a petition for stay of effectiveness of a final order within ten days of its service unless otherwise provided by statute or stated in the final order. Disposition of the petition for stay shall be made by the presiding officer, reviewing officer, or agency head as provided by agency rule. Disposition may be made either before or after the effective date of the final order. Disposition denying a stay is not subject to judicial review.

Wash. Rev. Code § 34.05.479(1), (5) (2002)

Emergency adjudicative proceedings. (1) Unless otherwise provided by law, an agency may use emergency adjudicative proceedings in a situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action.

* * * * *

(5) After entering an order under this section, the agency shall proceed as quickly as feasible to complete any proceedings that would be

required if the matter did not involve an immediate danger.

Wash. Rev. Code § 34.05.550 (2002)

Stay and other temporary remedies. (1) Unless precluded by law, the agency may grant a stay, in whole or in part, or other temporary remedy.

(2) After a petition for judicial review has been filed, a party may file a motion in the reviewing court seeking a stay or other temporary remedy.

(3) If judicial relief is sought for a stay or other temporary remedy from agency action based on public health, safety, or welfare grounds the court shall not grant such relief unless the court finds that:

(a) The applicant is likely to prevail when the court finally disposes of the matter;

(b) Without relief the applicant will suffer irreparable injury;

(c) The grant of relief to the applicant will not substantially harm other parties to the proceedings; and

(d) The threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances.

(4) If the court determines that relief should be granted from the agency's action granting a stay or other temporary remedies, the court may remand the matter or may enter an order denying a stay or granting a stay on appropriate terms.

Wash. Rev. Code 48.48.040 (2002)

Standards of safety. (1) The chief of the Washington state patrol, through the director of fire protection or his or her authorized deputy, shall have authority to enter upon all premises and into all buildings except private dwellings for the purpose of inspection to ascertain if any fire hazard exists, and to require conformance with minimum standards for the prevention of fire and for the protection of life and property against fire and panic as to use of premises, and may adopt by reference nationally recognized standards applicable to local conditions.

(2) The chief of the Washington state patrol, through the director of fire protection or his or her authorized deputy, may, upon request by the chief fire official or the local governing body or of taxpayers of such area, assist in the enforcement of any such code.

Wash. Admin. Code 51-40-0313.4.1 (2003)

Evacuation capability. Evacuation capability is the ability of the clients of a licensed care facility to respond to an emergency situation and either evacuate a building or move to a point of safety. Clients shall be classified in one of the following levels:

I – persons physically and mentally capable of walking or traversing a normal path to safety, including the ascent and descent of stairs, and capable of self-preservation, without the physical assistance of another person.

II – persons physically and mentally capable of traversing a normal path to safety with the use of mobility aids, but unable to ascend or descend stairs without the physical assistance of another person.

III – persons physically or mentally unable to walk or traverse a normal path to safety without the physical assistance of another person.

Wash. Admin. Code 51-40-0313.8.2.1 (2003)

Sprinkler Systems. An automatic sprinkler system shall be installed throughout every licensed care facility three or more stories in height or licensed for more than 16 clients. Licensed care facilities with 16 or fewer clients, licensed to provide care for more than two clients who have an evacuation capability of II or III, shall be provided

with an automatic sprinkler system throughout the facility.

EXCEPTION: An automatic sprinkler system need not be installed in any licensed care facility licensed for six or fewer clients regardless of the level of evacuation capability.

Where a sprinkler system is required, a system complying with UBC Standard 9-1 shall be installed.

EXCEPTIONS:

1. An automatic sprinkler system complying with UBC Standard 9-3 may be installed in buildings of four stories or less.

2. Where a Group LC Occupancy is being established by change of occupancy in an existing building not protected by a sprinkler system as is required above for buildings of new construction, an automatic sprinkler system complying with NFPA Standard 13d may be installed provided the care facility is licensed for not more than 16 clients.

Residential or quick-response heads shall be used in all sprinkler systems.

Wash. Admin. Code 212-12-005(5), (22) (2003)

Definitions. Unless otherwise clarified in this section, definitions in the State Building Code

shall apply to this chapter. The following definitions shall also apply to this chapter:

* * * * *

(5) "Ambulatory" means physically and mentally capable of walking or traversing a normal path to safety, including the ascent and descent of stairs, without the physical assistance of another person.

* * * * *

(22) "Nonambulatory" means physically or mentally unable to walk or traverse a normal path to safety without he physical assistance of another person.

Wash. Admin. Code 212-12-010(1)(d), (3)(a), 4(c) (2003)

Adoption of fire safety standards. (1) Application. This regulation shall apply to: . . .

* * * * *

(d) Boarding homes (RCW 18.20.130).

* * * * *

(3) Fire safety standards. The fire safety standards of the director of fire protection shall be as follows:

(a) The fire safety standards or applicable portions thereof as found or referenced in the State Building Code Act, chapter 19.27 RCW.

* * * * *

(4) **Enforcement**. Enforcement of these fire safety standards shall be as follows: . . .

> (c) Existing licensed occupancies previously approved by the state fire marshal as in conformance with the standards then in effect shall have their existing use or occupancy continued, provided such continued use is not dangerous to life and is acceptable to the local fire and building officials having jurisdiction.

* * * * *

Wash. Admin. Code 212-12-030 (2003)

Standards. The fire and life safety standards of the fire protection bureau shall include the following:

(1) Chapter 51-40 WAC, State Building Code adoption of the 1997 edition of the Uniform Building Code, standards and amendments.

(2) Chapter 51-42 WAC, State Building Code adoption of the 1997 edition of the Uniform Mechanical Code, standards and amendments.

(3) Chapter 51-44 WAC, State Building Code adoption of the 1997 edition of the Uniform Fire Code, and amendments.

(4) Chapter 51-45 WAC, State Building Code adoption of the 1997 edition of the Uniform Fire Code Standards.

Wash. Admin. Code 388-78A-010 (2003)

Definitions. For the purpose of this chapter, the following words and phrases shall have the following meanings unless the context clearly indicates otherwise.

* * * * *

"Aged person" means, according to RCW 18.20.020, a person of the age of sixty-five years or more, or a person of less than sixty-five years who by reason of infirmity requires domiciliary care.

"Ambulatory" means capable of walking or traversing a normal path to safety without the physical assistance of another individual;

(1) **"Semi-ambulatory"** means physically and mentally capable of traversing a normal path to safety with the use of mobility aids, but unable to ascend or descend stairs without the physical assistance of another individual;

(2) **"Nonambulatory"** means unable to walk or traverse a normal path to safety without the physical assistance of another individual.

* * * * *

"Boarding home" means any home or other institution, however named, which is advertised, announced or maintained for the express or implied purpose of providing board and domiciliary care to three or more aged persons not related by blood or marriage to the operator. It shall not include facilities certified as group training homes pursuant

to RCW 71A.22.040, nor any home, institution or section thereof which is otherwise licensed and regulated under the provisions of state law providing specifically for the licensing and regulation of such home, institution or section thereof. Nor shall it include any independent senior housing, independent living units in continuing care retirement communities, or other similar living situations including those subsidized by the department of housing and urban development.

* * * * *

"Construction" means:

(1) A new building to be used as a boarding home or part of a boarding home;

(2) An addition, modification or alteration to the facility which changes the department-approved use of an existing boarding home or portion of a boarding home; and

(3) An existing building or portion thereof to be converted for use as a boarding home.

* * * * *

"Department" means the Washington state department of social and health services.

* * * * *

"Licensee" means the person to whom the department issues the boarding home license.

"Licensed resident bed capacity" means the resident occupancy level requested by the licensee and approved by the department.

"Licensed room list" means a department-approved list identifying resident rooms, the dimensions and calculated square footage of each room, the number of approved bed spaces, and other information relative to the licensed resident bed capacity of a boarding home.

* * * * *

"State Building Code" means chapter 51-20 WAC, State Building Code adoption and amendment of the Uniform Building Code; chapter 51-22 WAC, State Building Code adoption and amendment of the Uniform Mechanical Code; chapter 51-24 WAC, State Building Code adoption and amendment of the Uniform Fire Code; and chapter 51-25 WAC, State Building Code adoption and amendment of the Uniform Fire Code.

* * * * *

"Vulnerable adult" means an individual sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself.

* * * * *

Wash. Admin. Code 388-78A-020 (2003)

Licensure–Initial, renewal, day care approval respite care, modifications. (1) A person shall have a current license issued by the department before operating or advertising a boarding home.

(2) An Applicant for initial licensure shall submit to the department, forty-five days or more before commencing business:

(a) A completed application on forms provided by the department;

(b) Verification of department approval of facility plans submitted for construction review;

(c) A criminal history background check in accordance with WAC 388-78A-045(2);

(d) The fee specified in WAC 388-78A-990; and

(e) Other information as required by the department.

(3) A licensee shall apply for license renewal annually at least thirty days before the expiration date of the current license by submitting to the department:

(a) A completed application on forms provided by the department;

(b) A criminal history background check in accordance with WAC 388-78A-045(2);

(c) The fee specified in WAC 388-78A-990; and

(d) Other information as required by the department.

(4) A licensee, prior to accepting adults for day care, shall:

(a) Submit a letter to the department which includes:

(i) The maximum number of adults in the proposed day care program; and

(ii) An attestation of meeting the requirements in WAC 388-78A-330;

(b) Obtain written department approval, including the maximum approved capacity for day care adults; and

(c) Maintain and post written approval in a conspicuous place on the boarding home premises.

(5) A licensee may provide respite care within the licensed bed capacity.

(6) A licensee, prior to changing the licensed bed capacity, shall:

(a) Submit a letter requesting approval to the department at least thirty days before the intended change;

(b) Submit the prorated fee as determined by the department; and

(c) Obtain an amended license indicating the new bed capacity.

(7) A licensee, prior to changing the location or use of rooms listed on the licensed room list shall:

(a) Notify the department in writing thirty days or more before the intended change; and

(b) Maintain a copy of the licensed room list.

(8) At least thirty days before selling, leasing, or renting the boarding home or changing officers or partners, and immediately upon a change of administrator, the licensee shall submit to the department:

(a) Name and address of the boarding home;

(b) Type of change;

(c) Full names of the present and prospective licensee;

(d) Date of proposed change;

(e) Names and addresses of all responsible officers or controlling partners; and

(f) A signed statement attesting that any new controlling officers are in compliance with this chapter.

Wash. Admin. Code 388-78A-240 (2003)

Criteria for accepting and retaining residents. (1) The licensee shall evaluate the ability of staff and facilities to meet a prospective resident's housing, domiciliary, dementia, and nursing care needs, based on:

(a) Space, equipment and furniture requirements;

(b) General behavior including the tendency to wander, fall, act verbally or physically abusive or socially inappropriate;

(c) Current medication status and need for assistance in obtaining or administering medications;

(d) Height, weight and age;

(e) Functional abilities, including but not limited to:

(i) Ambulatory status and need for mobility aides;

(ii) Mental status and behavioral problems;

(iii) Ability to perform activities of daily living independently or with assistance; and

(iv) Conditions requiring staff monitoring or care of the resident.

(2) If the licensee accepts residents requiring limited nursing services, in addition to the information specified in subsection (1) of this section, the licensee shall consider:

(a) Medical diagnosis;

(b) Blood pressure;

(c) Any chewing, swallowing, mouth and dental problems and treatments;

(d) Any infections, skin rashes, ulcers and open lesion problems and treatments;

(e) Appetite and hydration status;

(f) Need for chemotherapy, radiation and dialysis; and

(g) Any urethral catheter use and type.

(3) The licensee shall accept and retain an individual as a resident only when:

(a) The individual is ambulatory unless the boarding home is approved by the Washington state director of fire protection to care for semi-ambulatory or nonambulatory residents;

(b) The individual does not need medical or nursing care exceeding that allowed by WAC 388-78A-265 and 388-78A-268;

(c) A nonsmoking individual can be accommodated with a smoke-free room and smoke-free common-use areas;

(d) A smoking individual can be accommodated by areas meeting the requirements in WAC 388-78A-140(2);

(e) The individual can be accommodated by:

(i) The physical plant, facilities and spaces;

(ii) Furniture and equipment;

(iii) Staff who are available and sufficient to provide the type of

domiciliary care required and desired by the individual; and

(iv) Staff who are available and sufficient to provide limited nursing services, as required by the individual, if the boarding home provides such services;

(f) The appropriate medication service type pursuant to RCW 18.20.160 and WAC 388-78A-300 is available in the boarding home; and

(g) The individual meets the acceptance criteria defined in the boarding home policies and procedures.

(4) The licensee shall not accept or retain individuals:

(a) Exhibiting continuing overt acts which present a risk of harming self or others, including but not limited to self-mutilation, suicide attempts, and hitting or striking out at others;

(b) Having major areas of skin breakdown and opened wounds; or

(c) Whose needs can only be met by inpatient care in a hospital, nursing home, or other facility licensed under chapter 18.51, 71.12, or 70.41 RCW; and

(5) Upon admitting a resident, the licensee shall document in the resident's health record, the resident's choice regarding:

(a) Definite arrangements with a health care practitioner; and

(b) The identity of individuals to contact in case of an emergency, illness or death.

Wash. Admin. Code 388-78A-340 (2003)

Exemptions. (1) The department may exempt the licensee from meeting a specific requirement in this chapter if the department determines the exemption will not jeopardize the health or safety of residents.

(2) A licensee wishing to request an exemption shall submit a written request to the department, including:

(a) A description of the requested exemption;

(b) Reason for the exemption; and

(c) Impact of the exemption on resident health and safety.

(3) The licensee shall retain a copy of each approved exemption in the boarding home.

OPPOSITION BRIEF

132
RECORD AND BRIEFS

(3)

No. 08-1023

Supreme Court, U.S.
FILED
APR 15 2009
OFFICE OF THE CLERK

In The

Supreme Court of the United States

PAT LASHWAY, DIRECTOR OF RESIDENTIAL CARE SERVICES FOR THE WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES (DSHS), IN HER INDIVIDUAL CAPACITY, ET AL.,

Petitioners,

CAREPARTNERS, LLC, ET AL.,

Respondents.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PAUL A. LINDENMUTH,* WSBA#15817
4303 Ruston Way
Tacoma, WA 98402
Phone No.: 253-752-4444
Fax No.: 253-752-1035

**Counsel of Record*
Attorney for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Did the Ninth Circuit correctly determine that this Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), which imposes an obligation upon a Plaintiff to establish the absence of probable cause when bringing a claim for malicious prosecution under 42 USC § 1983 is limited to malicious prosecution claims, has no application on a claim where it is alleged that regulatory enforcement actions were taken against a regulated business in retaliation for exercise of First Amendment rights, when the limited justifications for the imposition of an absence of probable cause requirement discussed in *Hartman* are simply not present?

2. Did the Ninth Circuit correctly determine that the First Amendment rights of a citizen, who is conducting business within a regulated industry are unfettered by the concerns typically applicable to public employees, where the needs of the government as an employer are balanced against the rights of the employee to speak out?

3. Did the Ninth Circuit correctly deny Petitioners the affirmative defense of qualified immunity when as early as 1989 the Ninth Circuit opinion in *Sorrano's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989) clearly established that a plaintiff who is conducting business within a regulated industry need only establish that their speech was a substantial or motivating factor in adverse regulatory actions taken against them, under the

COUNTER-STATEMENT OF QUESTIONS PRESENTED – Continued

terms of this Court's opinion in *Mount Healthy School District Board of Education v. Doyle*, 429 U.S. 274 (1977), and when the governmental needs to regulate are fully accommodated by the affirmative defense afforded by the *Mount Healthy* opinion, which allowed the government to establish an absence of "but for" causation by showing that it would have reached the same decision even in the absence of the First Amendment protected conduct?

4. Did the Ninth Circuit correctly deny the Defendant's qualified immunity when there is simply no basis for a public official in the Petitioner's shoes to believe that they could engage in retaliation against the Respondent in reprisal for his First Amendment speech and activities?

PARTIES

Respondents concur in Petitioners' identification of parties.

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OPINIONS BELOW AND JURISDICTION

Respondents concur in Petitioners' statements regarding the Opinions Below and Jurisdiction.

STATEMENT

Beyond a few basic facts, clearly the parties do not agree with respect to the facts of the instant case. From Respondents' perspective, this case establishes that as with the power to tax, the power to regulate also includes the power to destroy. As discussed below, in this case, Petitioners herein used their regulatory authority in an abusive manner, and ultimately destroyed a good portion of Respondents' business for no legitimate reasons.

In the year 1999, Joseph Kilkelly and his company, CarePartners Management, LLC, acquired two long-term leases with respect to two boarding homes: one located in Lynnwood, Washington known as Alderwood Assisted Living (AAL), and another located in Wenatchee, Washington, known as Wenatchee Assisted Living (WAL). The two facilities at issue, AAL and WAL, had substantial fire safety features built into them and were built from the same plans. It is emphasized that the AAL facility was located across the street from the headquarters of the Lynnwood, Washington Fire Department. In addition, it is noted that both buildings were built in the year 1985, and both were legal at the time they were built, had fire walls, and were fully alarmed.

Under Washington's building and fire code regulations, buildings which were legal at the time that they were built are generally "grandfathered" and are not required to modernize their facilities anytime the building or fire code happens to change. In 1995, SFM (State Fire Marshal's Office) adopted what is known as the "LC Code," from which they ultimately argued that the two CarePartners facilities were required to retro-fit fire sprinkler systems into their facilities if they intended to provide services for semi-ambulatory and/or nonambulatory residents.

Initially, CarePartners examined the retro-fit sprinkler program and made a determination that they did not qualify under its terms. The next year (2000), the retro-fit program was modified to make its qualifying conditions less onerous. Nevertheless, upon examining the funding terms of the program, Mr. Kilkelly made the business decision that the grant funds would only pay for a small portion of the retro-fitting of the building with fire sprinkler systems. It is emphasized that it was understood that the fire sprinkler retro-fit program was to be an entirely voluntary program. The records produced below by SFM indicated that in 1998 there were a substantial number of boarding homes within the State of Washington that did not have sprinkler systems.

The fire sprinkler retro-fit program expired at the end of June, 2003. By July, 2003, there were still a substantial amount of boarding homes within the State of Washington which did not have sprinkler

systems, including AAL and WAL, as well as other larger facilities.

In December 2001, Petitioner Lashway sent a letter to boarding home providers which had been characterized as falling under the "LC Code" indicating that there would be additional information to follow from the State Fire Marshal's Office. On January 9, 2002, AAL, as well as other providers, received a letter signed by Assistant State Fire Marshal, Roger Woodside, which confusingly provided in part:

> *The boarding home licensing rule, Washington Administrative Code (WAC) 388-78A-240(3)(a) states . . . :*
>
> > *WAC 388-78A 010 defines "ambulatory", "semi-ambulatory" and "nonambulatory":*
> >
> > *"Ambulatory" means capable of walking or traversing a normal path to safety without the physical assistance of another individual.*
> >
> > *"Semi-ambulatory" means physically and mentally capable of traversing a normal path to safety with the use of mobility aids, but unable to ascend or descend stairs without the physical assistance of another individual.*
> >
> > *"Nonambulatory" means unable to walk or traverse a normal path to safety without the physical assistance of another individual . . .*

The following conditions apply to your facility:

Your boarding home may serve semi-ambulatory and nonambulatory residents on the ground level if you have a minimum of two exits that exit to grade or shall provide direct access to grade. *"On the ground level" means the semi-ambulatory and nonambulatory residents must exit directly to the outside without the use of intervening stairs, elevators, or platform lifts. (Only one exit is required if your boarding home serves six or fewer residents and no more that a total of two semi-ambulatory and nonambulatory residents).*

Your boarding home may serve semi-ambulatory and nonambulatory residents above the ground level only if:

1. *Your boarding home is divided into at least two compartments by smoke barriers regardless of the number of residents, and*

2. *Your boarding home is fully alarmed if you have 17 or more residents, and*

3. *Fire sprinklers are required if:*

   a. *Your building is three or more stories, or*

   b. *You are licensed to serve more than 16 residents, or*

> *c. You serve a total of three or more semi-ambulatory residents.*

(Emphasis added).

As suggested within the terms of the letter, CarePartners through staff made inquiry of SFM and Mr. Kilkelly personally discussed the issue with the Deputy Fire Marshal who regularly and routinely conducted annual inspections at the Alderwood facility.

It is emphasized that at all relevant times, the Alderwood facility had passed all of its prior Fire Marshal inspections in the years prior to and inclusive of the year 2003. It was only when the Petitioners herein targeted Mr. Kilkelly and endeavored to reinterpret the relevant fire codes, that it became a requirement that AAL retro-fit its facility with sprinkler systems. Additionally, it is noted that AAL was subject to annual surveys by RCS (Residential Care Services) personnel and had previously passed all such surveys without any concerns regarding the ambulatory status of its resident population or a concern that there was a need for a fire sprinkler system within the facility.

Based on the face of the letter, and the communications with SFM, Mr. Kilkelly reasonably concluded that AAL could have semi-ambulatory and nonambulatory residents, so long as, they did not have two above the ground floor. Otherwise, the facility was qualified because it had exits to grade. Such a position was also consistent with the provisions of the Uniform Building Code, which had also been adopted within the

State of Washington, and applicable to Mr. Kilkelly's building.

The issues that ultimately brought this matter to a head, started in the beginning of the year 2003. Mr. Kilkelly and CarePartners, dissatisfied with an annual survey conducted by RCS in 2002, regarding another facility known as Meridian Hills, located in Puyallup, Washington, and which was also owned and operated by CarePartners, filed an administrative appeal through available procedures to challenge RCS's survey findings.

In January and February of 2003, Mr. Kilkelly was involved in a full administrative hearing with respect to the Meridian Hills issue. At the same time, Mr. Kilkelly was advocating that he be granted a licensing exemption from RCS personnel with respect to a facility located in Lakewood, Washington. As part of this effort to gain an exception, Mr. Kilkelly not only lobbied upper RCS management, but was also communicating with relevant State legislatures, that DSHS hierarchy who were in a position above Petitioner Lashway, who at that time was the Director of RCS.

Ultimately, Mr. Kilkelly was denied his exemption because, according to Petitioner Lashway, it would have provided Mr. Kilkelly with favored treatment. Subsequently, when it came to selling off the AAL facility after Mr. Kilkelly's license was revoked, the same type of favored treatment was provided to the persons who purchased Mr. Kilkelly's facility. In

other words, when Mr. Kilkelly was attempting to acquire a facility, an exemption was not provided. When he was selling off the AAL facility due to the regulatory actions discussed below, the person purchasing the facility was provided with such "favored treatment."

Almost simultaneously, issues began to arise at WAL with respect to the semi-ambulatory and non-ambulatory residents within the facility. When responding to such concerns, Mr. Kilkelly clearly let it be known that he believed that he could have semi-ambulatory and nonambulatory residents, so long as, no more than two were housed above the ground floor.

Unknown to Mr. Kilkelly, the position he was taking with respect to the requirements regarding semi-ambulatory and nonambulatory residents began to generate a substantial amount of communication among personnel from RCS and SFM. From the period of March to June, 2003, internal emails reveal that SFM personnel began to engage in a lengthy debate as to whether or not it could require sprinkler systems in boarding homes based on the ambulatory status of their residents, or simply because they had 16 or more residents in total. If one reviews those emails, it is very clear that the regulation applicable to such situations was far from clear, and Mr. Kilkelly's position on how the codes were to be interpreted, particularly in light of the above-referenced letter, was entirely reasonable.

Further, if one actually reads the tenor of the emails, it is very clear that SFM in coordination with RCS personnel wanted to reinterpret the regulations in a manner which fit their position that they could require sprinkler systems in facilities such as AAL and WAL depending upon the ambulatory mix of the residents. Unfortunately, at the time the Fire Marshal's Office was debating whether or not they could impose such regulations, they were not communicating with Mr. Kilkelly and not indicating to him that there was a reasonable possibility that there would be either a new and/or reinterpretation of the regulations which would require him to put in a sprinkler system.

Instead, Alderwood passed its 2003 annual survey, and passed its 2003 Fire Marshal inspection. Unfortunately, again it is noted that at that time, there was no communication with Mr. Kilkelly indicating that in the future he would likely be required to add a fire sprinkler system to the facility. Instead, SFM and RCS personnel began communicating secretly to make a determination as to whether or not they could impose the requirement of AAL and WAL, or whether or not these two facilities complied with the rules.

Tellingly, during the course of these meetings, Petitioner Stockwell (Petitioner Lashway's second in command), prior to any inspection of the facility to ensure compliance even under the more strict interpretation of the rules, was already discussing the need to revoke AAL's boarding home license. In other

words, it had already been determined prior to any inspection and any determination regarding the ambulatory status of Mr. Kilkelly's residents, that his boarding home license was going to be revoked without any meaningful opportunity or time to allow him to come into compliance.

After much planning and deliberation as to what exactly the rules were, on June 23rd and 24th, 2003, personnel from RCS and SFM simultaneously "raided" both WAL and AAL to conduct an extraordinary survey. At no time during the course of these extraordinary surveys was anyone informed that the purpose of the survey was to determine whether or not WAL or AAL had complied with the new interpretation of the fire, building and LC code regulations, which the Fire Marshal's Office had just divined. Residents were not told that they were being tested for their ambulatory abilities as it related to evacuating the building in emergent situations or when there was a fire. No physical testing was done to determine whether or not they could actually walk up and down the small stairways at AAL or WAL, without assistance, or whether they could leave the building without assistance in the case there was a need to evacuate. It is noted that most of the residents at both AAL and WAL had sliding glass doors with exits to a large grass courtyard.

In other words, evacuation of most of the residents, if they were in their rooms at the time of an emergency, would be literally a few steps away.

In any event, while RCS surveyors were examining residents' files to discern information regarding their ability to ambulate, Deputy Fire Marshal Mike Sturgeon was performing what appeared to be a routine and regular fire inspection. At the end of this extraordinary survey, CarePartners was not provided with what was known as a "exit interview," and was only provided a statement of deficiencies by SFM that in no way related to the application of the "LC Codes" or whether or not, given the ambulatory status of CarePartners residents, that it was a non-compliant facility (based on the new regulatory interpretation) due to the absence of a sprinkler system.

It is noted that the documentation that RCS surveyors were examining with respect to the residents provided only limited information with respect to the residents' ability to ambulate as defined by the regulations set forth at Appendices 90 through 92, attached to the Petition for Writ of Certiorari. When dealing with these particular fire and building codes, determining who is or is not "ambulatory" is based on the regulatory language which are essential terms of art. In other words, simply because a person has some mobility issues does not necessarily make them nonambulatory or semi-ambulatory for the purposes of the regulations.

Late in the day on Friday, June 27, 2003, CarePartners was informed by regional management staff, within the chain of supervision over WAL and AAL, that they had been found to be in non-compliance due to the absence of sprinkler systems within the

facilities and due to the fact the RCS had re-characterized a large portion of the residents of AAL, and to a lesser degree, WAL, as being either semi-ambulatory or nonambulatory. When this matter was pending before the District Court, Respondents submitted for consideration a DVD video recording showing that a number of the individuals at AAL who were characterized as being semi-ambulatory and nonambulatory had very few difficulties with respect to their ability to ambulate.

After such an announcement, Mr. Kilkelly was faxed a copy of a statement of deficiencies, a notice of conditions on license, which required, among other things, that he hire "fire watchers" within a 24 hour time frame and that Respondents have communications, within 24 hours with a local fire official (who happened to be on vacation that week). In addition, when Mr. Kilkelly made a query as to whether or not he could challenge RCS's re-determination as to the ambulatory status of AAL residents, the response was an unequivocal no. In other words, although RCS's own rules and regulations provide for a dispute resolution process to challenge the factual sufficiency of any allegations relating to a statement of deficiencies, when it came to the ultimate factual determination, which supported the government's position that Mr. Kilkelly was not in compliance with newly interpreted regulations, he was denied any and all opportunity to challenge such factual determinations.

Once this matter was before the District Court, Mr. Kilkelly presented the expert opinions of nurse

consultants who reviewed the work of RCS personnel and evaluated AAL's residents. Respondents' experts indicated that in most instances RCS's ambulation determinations were simply wrong and only a few residents were in such categories.

In addition, one of the conditions on AAL's license was a requirement that AAL discharge over 80% of its residents in a 30-day time period. Discharging 80% of AAL's residents would have effectively put it out of business because of the economic impact resulting from such a forced exodus.

Alarmed by the conditions, some of which presented factual impossibilities, Mr. Kilkelly hired Mr. Thomas Grimm as his attorney. Mr. Grimm and Mr. Kilkelly thereafter made substantial efforts to try to communicate with RCS staff and SFM staff to arrange a meeting with individuals with decision-making authority to try to resolve all of the issues.

While the Petitioners make light of the fact that in this time frame SFM and RCS staff were not communicating with Mr. Kilkelly, such dismissiveness simply ignores that traditionally and typically when addressing regulatory compliance issues, RCS and SFM staff regularly communicated with providers in order to aid them in arriving at compliance. This is particularly troubling given the fact that any time either Mr. Kilkelly or Mr. Grimm were able to communicate with someone at either RCS or SFM, it was indicated to them that they desired to put in a fire sprinkler system, and wanted to work out conditions

which would allow the residents to remain in their home until the fire sprinkler system was installed.

It is noted that under the terms of the initial regulatory orders, the residents were allowed to stay in the home for a 30-day time frame if certain conditions were met. Mr. Kilkelly was simply looking to extend such conditions, so he could comply, preserve his business, and to prevent the disruption of the lives of a substantial number of residents, many of whom had lived at the facility for a number of years.

Unfortunately, and unknown to Mr. Grimm and Mr. Kilkelly, SFM staff had been instructed not to speak to Mr. Kilkelly, apparently because he had hired a lawyer and because he was disputing the actions of the Department.

In addition, a second statement of deficiencies, which had been generated by SFM employee Sturgeon, and which was provided to RCS personnel and incorporated into the RCS statement of deficiencies, had been purposely withheld from CarePartners at the direction of SFM management.

While Petitioners contend that during this time frame Mr. Kilkelly was not cooperative, the facts taken in a light most favorable to Respondents herein indicate that Mr. Kilkelly was cooperative, and was trying to work toward a solution with Petitioners. Unfortunately, it appears that the Petitioners were more interested in shutting down AAL than working out a solution, which would have prevented the disruption of the lives of nearly 50 residents. Further,

while the Petitioners tried to distinguish the actions of Mr. Kilkelly with respect to AAL versus WAL, it is noted that removal of nine residents from WAL certainly was far less onerous and destructive than that which was being required of AAL.

Further, it is noted that such allegations are somewhat academic given the fact that subsequently, the Petitioners were willing to allow the residents to remain so long as certain conditions were met, which were essentially impractical and/or impossible to meet. Further, it is noted that although Mr. Kilkelly did comply with the "fire watcher" requirement, such a requirement in and of itself objectively may very well have defied common sense. The AAL building was a U-shaped building, where only one side of the "U" had a second story. Essentially, the building is comprised of four hallways, common rooms in the central area (dining room, nursing area and the like), and the private rooms of the residents within the facility. All of the rooms had fire alarms and the building had other fire safety features.

As the residents' rooms were private, any fire watcher could not walk into the residents' rooms. As such, the task of a "fire watcher," given the circumstances, simply would have been patrolling four hallways. It is noted that should a fire start, the most likely place for a fire to occur would be within one of the residents' rooms. As the residents' rooms were fully alarmed, the alarms would sound before any smoke would have been discernible from the hallways and observable by the fire watcher.

Nevertheless, despite the near absurdity of the requirement, Mr. Kilkelly was willing to dedicate staff to operate as fire watchers in order to keep his facility open.

Concerned that they were making no headway in arranging a meeting between RCS staff and CarePartners, Mr. Kilkelly sought out the help of an attorney named Robin Dale, who had previously worked for the Department as a Washington State Assistant Attorney General. Mr. Dale contacted individuals with the State Attorney General's Office, who immediately let it be known that Mr. Kilkelly was someone who was "known" to the Department, in a negative sense, and that the Director of the Department, Petitioner Lashway, was losing patience with Mr. Kilkelly. Emails, generated in response to Mr. Kilkelly's lobbying efforts, disclosed during discovery, indicated that RCS viewed Mr. Kilkelly as a less than desirable person apparently because in the negative sense he had "a history" with the Department. However, when one actually examines the history of Mr. Kilkelly's interactions with RCS, the only arguably negative interaction he had with them in the past was the fact that he had taken issues to an administrative hearing, and had made an unsuccessful effort to lobby RCS and elected officials on the issue of receiving an exemption for a project located in Lakewood, Washington.

Ultimately, Mr. Dale was able to arrange a meeting for AAL dated July 10, 2003 with regional administrators regarding that facility and a parallel

meeting was set for July 11, 2003, with RCS regional administrators in Eastern Washington regarding the Wenatchee facility.

On July 10, 2003, Mr. Kilkelly presented to RCS regional administrators his plan of correction, which included taking interim measures that would allow him to retain his residents while fire sprinklers were being installed. The next day, on July 11, 2003, the same plan of correction was submitted in Wenatchee to the regional administrators.

Surprisingly, on the same day as the Wenatchee meeting, Mr. Kilkelly received an Order suspending and revoking his license to conduct business at the Alderwood facility in an order which stopped any further placement of residents within that facility.

Again, July 11, 2003, was a Friday, and the revocation order was served on Mr. Kilkelly at a time which limited his immediate ability to respond. The following Monday, on July 14, 2003, Mr. Kilkelly filed a motion in State Court to stay the revocation and suspension which was granted on a temporary basis. The Superior Court judge, who heard the temporary stay motion directed the parties to engage in mediation efforts prior to returning to the Court to find out whether a preliminary injunction would issue.

On or about July 18, 2003, the parties met to try to negotiate a resolution. Mr. Kilkelly at the meeting indicated he was more than willing to put in fire sprinkler systems and engage in reasonable interim safety measures. Mr. Kilkelly presented a written

commitment from the building owner to allow the retro-fitting of fire sprinklers but because of the need to acquire building permits from the local municipality, Mr. Kilkelly could not absolutely guarantee that the sprinkler system would be completed in a 90 day period.

In response to Mr. Kilkelly's offer to comply with the conditions placed on his license, in an affirmative and forthright manner, ***SFM and RCS indicated those conditions were no longer good enough and added the additional condition that he hire 2 full time firefighters to patrol the first and second floor of the facilities, on a 24 hour a day, 7 days a week, basis. Quickly Mr. Kilkelly realized that such a condition would require him to man 42 work shifts with expensive firefighters, at the cost of tens of thousands of dollars.*** At that point the negotiations broke down and the parties proceeded to allow the State Court judge to decide the stay motion. Unfortunately, the preliminary injunction was denied, and as a result all residents were involuntarily removed from the Alderwood facility and it was effectively closed down.

During the pendency of the above, CarePartners also had filed for an administrative review under the State of Washington Administrative Procedures Act. However, such efforts at administrative review simply came too late because by the time any hearing would have been available, all the residents had been removed from the Alderwood facility and it had been effectively closed down.

On the other hand, even though the Wenatchee facility had the exact same plan of correction as AAL, it was allowed to remain open, utilizing the interim measures set forth in the plan of correction. To this date, the Wenatchee facility continues to be open but now has a fire sprinkler system within its building. In addition, following the closure of Alderwood, RCS and SFM continued to engage in a program of forcing boarding homes to install sprinkler systems. These other boarding homes were provided substantially better treatment than that afforded to AAL. They were allowed to institute informal fire watchers using existing staff and given several months to install sprinklers. They were not required to discharge residents.

PROCEEDINGS BEFORE THE DISTRICT COURT AND THE NINTH CIRCUIT

On or about June 17, 2005, Respondents filed their Complaint for Damages in the United States District Court for the Western District of Washington at Seattle. Within their Complaint, Plaintiffs, among other things, alleged that their First Amendment rights were violated due to the regulatory actions that were taken against them.

Initially, Petitioners herein filed a Motion for a "More Definite Statement" under the guise of needing greater factual details to make a determination as to whether or not the affirmative defense of qualified

immunity could be asserted at an early stage in the litigation.

On or about September 23, 2005, the Petitioners' Motion for More Definite Statement was granted and a stay of discovery was entered with respect to the Constitutional claims that were asserted within the Complaint.

Following compliance with the Court's directive to provide a more definite statement, the Respondents sought relief from the discovery stay and the Court held a status conference on June 8, 2006. On June 12, 2006, the Court entered an Order lifting the stay, but limited discovery to that which was necessary in order to address the qualified immunity issue, which had previously been raised by a summary judgment motion filed by Petitioners prior to the status conference. The District Court allowed for the limited discovery of five depositions of no more than three hours each, and held in abeyance Petitioners' summary judgment motions until after completion of limited discovery.

Following the completion of limited discovery, and extensive briefing, on January 26, 2007, The Honorable Robert Lasnik issued an Order granting in part and denying in part Petitioners' motion for summary judgment on the issue of qualified immunity. Within that Order which is attached at Appendices p. 34 through 58 of the Petition, the District Court rejected application of what is known as the "*Rooker-Feldman* Doctrine" to the instant case, and determined

that the Petitioners were not entitled to summary judgment on the issue of qualified immunity on Respondents' First Amendment reprisal claim.

As indicated within the District Court's Order, the primary focus of the Petitioners' effort at summary judgment in the District Court, was to ask the District Court to determine that Mr. Kilkelly, as an individual conducting business within a regulated industry, would have the same or similar First Amendment rights to those of a public employee, or an independent contractor who is performing functions substantially similar to those performed by public employees.

The Petitioners relied heavily upon the case of *Board of County Commissioners of Wabaunsee County v. Umbehr*, 518 U.S. 668 (1996).

Examining precedent from the Ninth and other circuits, the District Court ultimately determined that the limitation on public employees' free speech rights, which had developed over the years predicated on the precedent of this Court, had no application under the circumstances where the speaker is a citizen who happens to be conducting business within a regulated industry. The District Court found that none of the justifications supporting the limitations on public employees' speech would necessarily have application under such circumstances. It did so in part in reliance on *Eichenlaub v. Township of Indiana*, 385 F.3d 274, 282-83 (3rd Cir. 2004).

Further, the District Court after determining that a potential substantive violation of the First Amendment had occurred, looked to the well-seasoned Ninth Circuit opinion in the case of *Sorrano's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314-16 (9th Cir. 1989).

Based on such an analysis of precedent, the District Court determined that on utilization of summary judgment standards, there were questions of fact to be resolved by the jury as to whether or not the Petitioners violated Mr. Kilkelly's clearly established First Amendment rights.

Tellingly, if one examines the pleadings before the District Court and the District Court's summary judgment decision, at no time was the case of *Hartman v. Moore*, 547 U.S. 250 (2006) cited by the Petitioners, nor did the Petitioners argue before the District Court that a "probable cause" standard should be applicable to the claim brought by Mr. Kilkelly. The entire focus of the Petitioners' argument before the District Court was that Mr. Kilkelly simply had not made out a First Amendment violation under standards that are otherwise applicable to public employees.

It is noted the case is now currently pending before the District Court, the Mandate of the Ninth Circuit having issued on November 18, 2008. At no time since the issuance of the Mandate have the Petitioners attempted to raise the "probable cause" issue before the District Court.

As is permitted under this Court's decision of *Mitchell v. Forsythe*, 472 U.S. 511, 530 (1985), the Petitioners filed an Interlocutory Notice of Appeal to the Ninth Circuit Court of Appeals of the District Court's Order denying to Petitioners the defense of qualified immunity with respect to Respondents' First Amendment retaliation claim.

As indicated within the Petition for Writ of Certiorari, on September 5, 2008, the Ninth Circuit issued the opinion at issue herein. That opinion can now be found at 545 F.3d 867 (9th Cir. 2008). Following this Court's opinion in *Johnson v. Jones,* 515 U.S. 304, 313, 319-20 (1995), the Ninth Circuit limited review to that of determining whether or not clearly established rights were violated based on either the Respondents' version of the facts and/or the undisputed facts, but did not consider questions regarding the sufficiency of the evidence which a party may or may not be able to prove at time of trial.

In rendering its decision, the Ninth Circuit acknowledged that the instant case came before it before the completion of discovery and that the District Court indicated that it would entertain a subsequent motion for summary judgment after full completion of discovery.

With respect to the "*Hartman v. Moore*" issue, which is now the cornerstone of Petitioners' Petition, the Ninth Circuit addressed the issue at footnote 7 of its opinion.

Further, the Ninth Circuit rejected the Petitioners' contention that elements peculiar to public employee claims should be imported to apply to the speech of persons conducting business within a regulated industry. In doing so, the Ninth Circuit surveyed available precedent and found no authority which would allow the importation of the "public concern" element recognized in *Connick v. Meyers*, 461 U.S. 138 (1983), nor what is known as the *Pickering* balancing test to Respondents claim. See, *Pickering v. Board of Education*, 391 U.S. 563 (1968).

Further, the Ninth Circuit opinion did not leave the Petitioners without a defense. As indicated within the Ninth Circuit's opinion, in relying on its prior *Sorrano's Gasco* opinion, once the Plaintiffs (Respondents herein) made a prima facie showing that their First Amendment rights were violated, the government nevertheless could defeat such a claim by establishing that it would have made the exact same regulatory decisions in the absence of the protected "speech." This has generally been known as the *Mount Healthy* defense. See, *Mount Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1977).

In other words, Plaintiffs such as CarePartners will still have to prove their case. The simplest answer to the Petitioners' concern about the potential for liability under such circumstances, is to not engage in unlawful retaliatory conduct.

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

1. The District Court and the Ninth Circuit correctly applied summary judgment and qualified immunity standards.

In the instant matter, Petitioners' primary arguments are factual. It is suggested that such "factual" arguments are an inappropriate basis for the grant of a Petition for Writ of Certiorari when the rules applicable to summary judgment motions on the issue of qualified immunity are well established. This is particularly so given the fact that the case is currently before the Court only after limited discovery specifically designed to address the qualified immunity issue and the Ninth Circuit expressly disavowed reviewing the matter for factual sufficiency.

It has long been recognized by this Court that a motion for summary judgment is only appropriate if the record establishes that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue of fact is a genuine issue of fact if the records as a whole can lead a reasonable trier of fact to find for the non-moving party. An issue is "material" if it might affect the outcome of the case under the governing law. See, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

While it is true that the non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts, a Court nevertheless in ruling on a motion for summary judgment must believe the evidence of the non-movant and must draw all justifiable inferences from the evidence in the non-moving party's favor. See, *Anderson*, 477 U.S. at 255; see also, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

As correctly pointed out within the Ninth Circuit opinion in this matter, such principles are fully applicable when the summary judgment motion involves a claim of qualified immunity brought as a defense by public officials who have been sued under 42 U.S.C. § 1983.

As has long been recognized, qualified immunity protects government officials sued in their individual capacities pursuant to 42 U.S.C. § 1983, from civil liability, so long as their conduct does not violate clearly established statutory or Constitutional rights of which a reasonable person would have known. See, *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Ultimately, this inquiry turns on "the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Wilson v. Layne*, 526 U.S. 603, 614 (1999). See also, *Hope v. Pelzer*, 536 U.S. 730-739 (2002).

Generally, once the defendant establishes that they were acting within their discretionary authority, the burden shifts to the plaintiff to show that qualified immunity is not appropriate. *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002). Under this Court's authority, a Court may first determine "whether the plaintiff's allegations, if true, established a Constitutional violation." See *Hope*, 536 U.S. at 736; see also, *Saucier v. Katz*, 533 U.S. 194, p. 201 (2001), overruled in part; *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009).

In order to determine whether an officer's conduct violates a clearly established Constitutional right, a Court must do more than just compare the facts of the case to a prior case to determine if a right is clearly established; it must also assess whether the facts of the instant case fall within statements of general principles found in appropriate precedence. See, e.g., *Hope*, 536 U.S. at 741 ("[o]fficials can still be on notice that their conduct violates law even in novel factual circumstances"). Indeed, in *United States v. Lanier*, 520 U.S. 259 (1997), this Court expressly rejected a requirement that previous cases be "fundamentally similar." The dispositive question is whether the state of the law gave the official "fair warning" that the alleged actions toward the plaintiff were unconstitutional.

Such fair notice and/or fair warning can be given in essentially three ways. First, the words of the Federal Statute or Constitutional provision may in themselves be specific enough to establish clearly the

law's application to a particular set of facts and then by that method overcome qualified immunity, even if there is a total absence of similar case law. See, *Vinyard*, 311 at 350; second, pre-existing case law may serve to provide fair notice. *Id.* at 352. Case law need not arise out of factually identical situations to clearly establish law for purposes of qualified immunity analysis. *Id.* Broad legal principles establishing case law may serve to clearly establish the law even for cases arising out of factually different situations. Third, in the absence of case law, with broad holdings sufficient to provide fair notice, fact specific precedent may serve to clearly establish the law arising out of materially factual circumstances. *Id.*

In the instant case, and under the Ninth Circuit opinion, clearly the Petitioners had "fair warning" that their actions were violative of Respondents' First Amendment rights.

As recognized by the Ninth Circuit, its well-seasoned opinion in the *Sorrano's Gasco v. Morgan* case involved facts that closely resemble the facts of this case. Further, the cases that hold that government officials cannot retaliate against citizens for speaking out based on their assertion of First Amendment rights are too numerous to cite. Nor can a public official simply ignore the fact that in many instances where the Circuit Courts have squarely addressed the question as to whether or not the "public concern" and *Pickering* balancing test should be utilized outside of the public employment context have rejected such notions. See, *Jenkins v. Rock Hill*

Local School District, 513 F.3d 580, 586-87 (6th Cir. 2008); *Van Delen v. Johnson*, 497 F.3d 1151, 1156-57 (10th Cir. 2007); *Campagna v. Mass. Dept. of Environmental Protection*, 34 F.3d 150, 154-55 (1st Cir. 2003); *Friedl v. City of New York*, 210 F.3d 719, 87 (2nd Cir. 2000); *Vickery v. Jones*, 100 F.3d 1334, 1346, n.1 (7th Cir. 1996); see also, *Thaddeus-X v. Blatter*, 175 F.3d 378, 390 (6th Cir. 1999); and *Eichenlaub v. Town of Indiana*, 385 F.3d 274, 283 (3rd Cir. 2004).

In other words, to the extent that the Petitioners are now contending that their governmental interests must be "balanced" against Respondents' First Amendment rights, no reasonable public official would take that point of view given the wealth of precedent rejecting such an approach.

In any event, no one is disputing that the State has a substantial regulatory interest to ensure that citizens within the State of Washington who reside in boarding homes are protected against the hazards of fire. That is simply not a matter which is within factual dispute. However, what is in dispute is whether or not they utilized such authority for such purposes, or whether a substantial or motivating factor in their actions was an inappropriate and unlawful motive. Under such circumstances, the Petitioners could avoid liability if it proved that it was not acting based on inappropriate motivations. Alternatively, and as discussed above, it still has available to it the *Mount Healthy* affirmative defense. Thus, governmental interests are fully served by the Ninth Circuit's analysis while at the same time

protecting Respondents' fundamental First Amendment rights. The Petitioners' position that simply because the underlying regulations at issue involve fire safety issues somehow alters the equation is unsupportable. Both the District Court and the Ninth Circuit properly applied the rules applicable to summary judgment and qualified immunity, and whether the Petitioners like it or not, there are substantial factual issues with respect to the propriety of their motivation.

2. The Ninth Circuit correctly determined that the probable cause standard applied in *Hartman v. Moore* has no application to the facts in the instant case.

It is respectfully suggested that the Petitioners' failure to raise *Hartman v. Moore* before the District Court should be deemed dispositive. Without having an opportunity to address the issue in the District Court, the Petitioners have effectively deprived Respondent of an opportunity to develop a factual record relevant to such an issue.

Be that as it may, clearly the doctrine set forth within *Hartman v. Moore*, 547 U.S. 250 (2006), has no application of claims brought in the instant case. As explained in footnote 7 of the Ninth Circuit's opinion herein, *Hartman v. Moore* dealt with the unique concerns generally applicable to malicious prosecution cases where there is a need to "bridge" the causation gap between the non-prosecuting governmental

agent, who instigates the prosecution, and the prosecutor, who makes an independent decision to prosecute, which is generally provided presumptive validity. Coming to such a conclusion, the Ninth Circuit relied on its prior decision in *Scoog v. Clackamas County*, 469 F.3d 1221 (9th Cir. 2006), which was issued the same year as the *Hartman* decision.

In *Scoog*, the Ninth Circuit rejected an application of *Hartman* in a case involving an unlawful search and seizure and arrest allegedly in violation of both First and Fourth Amendment rights. While recognizing that the Circuit Courts were divided on the issue, the Ninth Circuit on close analysis of relevant precedent, determined that on a First Amendment retaliation claim, involving the search and seizure of the person, the plaintiff did not have to prove an absence of probable cause in order to state a claim of retaliation. In reaching such a result, the Court carefully reviewed the *Hartman* decision, and found that pleading and proving the absence of probable cause is necessary in retaliatory prosecution cases because of the complexity of causation in such cases.

In fact, if one examines the elements of retaliatory prosecution, they are really cases involving retaliatory actions which **induce the prosecution**, because they can only be maintained against officials, such as investigators, who may persuade an otherwise immune prosecutor to act. To prove causation, a plaintiff must not only show that the defendant official harbored retaliatory animus, and thus induced the

prosecution, but also that the official succeeded in that the prosecutor would not have pressed charges otherwise. Such proof must exist in despite of a long-standing presumption that prosecutorial decisions are regular and are worthy of deference.

In *Scoog*, ultimately, the Court determined that *Hartman* only applies where there is multi-layered causation. In other words, although in that case a Magistrate Judge made a determination to issue a warrant, the retaliatory wrong-doer maintained control over the method and manner that such a warrant was served and ultimately made the determination to arrest the plaintiff.

Interestingly, in *Scoog*, the Court allowed the First Amendment case to continue even though it dismissed a claim pursuant to the Fourth Amendment because probable cause existed for the search.

Consistent with its opinion in *Scoog*, in the case of *Beck v. City of Upland*, 527 F.3d 853 (9th Cir. 2008), the Court held that in the context of a retaliatory prosecution claim, that the plaintiff had to prove an absence of probable cause because a prosecutor ultimately made the determination to move forward with criminal charges. Nevertheless, in *Beck*, the Court found there to be a question of fact as to whether or not there was an absence of probable cause, where like the instant case, there was an indication of an underlying animus in the investigator in charge of the decision.

Thus, reading *Scoog* and *Beck* together, one can reasonably conclude that *Hartman* is only applicable in multi-layered causation cases. Although the Petitioners would try to suggest that this is a multi-layered causation case because a Superior Court Judge denied injunctive relief, such a position lacks merit, particularly if one considers the heavy burden which Respondents had to meet in order to acquire injunctive relief.

See also, *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 901-02 (9th Cir. 2008) (the failure to plead and prove probable cause is not dispositive in ordinary retaliation cases, but the existence of probable cause is a relevant consideration when looking at the legitimacy of the government's actions).

Many of the concerns raised by the Petitioners are addressed in the *Dietrich* opinion. As noted in *Dietrich*, in cases where there is strong evidence of probable cause, and very weak evidence of a retaliatory motive, summary judgment may very well be appropriate. However, it is noted that in the instant case any "probable cause" was predicated on an unreasonable re-interpretation of the rule that was applied to Respondents in a Draconian fashion. The method and manner in which the rules were enforced in and of itself is indicative of a retaliatory motive, and there are a number of facts in which such inappropriate motives can be inferred. As such, the instant case is unlike *Dietrich*, where there was overwhelming evidence of probable cause and little or no evidence as to a retaliatory intent.

The cases that the Petitioners cite to the contrary, on reasoned analysis do not detract from the position taken by the Ninth Circuit. For example, in the case of *Williams v. City of Carl Junction, Missouri*, 480 F.3d 871, 876 (8th Cir. 2007), the Court was addressing a multiple-layer causation issue because in that case it was alleged that the Mayor had induced various police officers to issue 25 citations to the plaintiff. Thus, the *Williams* case is not particularly instructive on adding the *Hartman* element to cases not involving multiple causation. The facts of the *Williams* case raised the same complications as described in *Hartman* regarding causation, i.e. namely multiple levels of decision-making.

In addition, the case of *Barnes v. Wright*, 49 F.3d 709 (6th Cir. 2006), is a case where superficially it can be stated the Court made a wrong turn. In *Barnes* at 720, the Court stated that the *Hartman* opinion "sweeps broadly" without explaining its reasons why. Further, if one analyzes the facts of the *Barnes* case, it actually was a "retaliatory prosecution case", because the plaintiff in *Barnes* was ultimately convicted of three misdemeanors. Thus, *Barnes* raised similar concerns to that in *Hartman* regarding "the presumption of prosecutorial regularity." See generally, *Gullick v. Ott*, 517 F.Supp. 2d 1063, 1071-72 (W.D. Wisc. 2007). (Harmonizing *Williams, Barnes* and *Scoog*). See also, *Denney v. DEA*, 508 F.Supp. 2d 815, 830-31 (E.D. Cal. 2007) (When causation turns on the defendant's actions alone, and no bridge between motive and action is necessary, there is no requirement

under *Hartman* that an absence of probable cause be shown).

It is noted that the District Court in *Gullick* was easily able to harmonize the opinions of the Sixth, Eighth, and Ninth Circuits regarding *Hartman*. Also, even within the Eighth Circuit, there is growing recognition that *Hartman* is limited. See, *Cross v. Mokwa*, 547 F.3d 890 (8th Cir. 2008) (Judge Bye concurring in part and dissenting in part, and concurring in judgment in part). As indicated in Judge Bye's opinion in *Cross*, in *Williams* the Eighth Circuit inappropriately extended *Hartman* beyond its proper boundaries. Thus, to the extent that cases such as the instant case and *Scoog* cannot be harmonized with the decisions of the Sixth and Eighth Circuits, clearly the approach and limitations on *Hartman* recognized by the Ninth Circuit are appropriate.

Finally, to the extent that the Petitioners are contending that a "Circuit split" makes the law unclear and/or not clearly established for qualified immunity purposes, it is respectfully suggested that such contention simply misses the mark. As discussed above, the opinions of the various Circuits can be harmonized, and the Ninth Circuit had already ruled on the relevant issues in the *Sorrano's Gasco* and *Scoog* cases.

In sum, this is not a retaliatory prosecution case involving multi-layered decision making where an alleged independent person made the ultimate

decision. Petitioners in this matter are being called upon to be held accountable for their own actions.

Under such circumstances, no real purpose would be served in imposing a "probable cause" requirement onto Respondents' First Amendment retaliation claim.

While the Petitioners have asserted a number of interests, which may or may not be implicated by the instant case, the bottom line is that such interests are fully protected so long as government officials do not retaliate against citizens who exercise their First Amendment rights, or as in this instance, leave a significant enough evidentiary trail that it is at least a question of fact as to whether or not such inappropriate motivations came into play when they were making their regulatory decisions.

CONCLUSION

For the reasons stated herein, the Petition should be denied and the Ninth Circuit's decision in this matter should remain undisturbed.

Respectfully submitted,

PAUL A. LINDENMUTH, WSBA#15817
4303 Ruston Way
Tacoma, WA 98402
Phone No.: 253-752-4444
Fax No.: 253-752-1035

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IN THE SUPREME COURT OF THE UNITED STATES

PATRICIA K. LASHWAY, DIRECTOR OF RESIDENTIAL CARE SERVICES, WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, IN HER INDIVIDUAL CAPACITY, ET AL.,

Petitioners,

v.

CAREPARTNERS, LLC, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. MCKENNA
Attorney General

William Berggren Collins
Deputy Solicitor General
Counsel of Record

Michael P. Lynch
Senior Counsel

D. Thomas Wendel
Assistant Attorney General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245

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PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. Respondent CarePartners Does Not Contest That The Decision Below Effectively Eliminates Qualified Immunity

The petition explained that the decision below effectively eliminated qualified immunity for public officials enforcing requirements on closely-regulated business for First Amendment retaliation claims. Pet. 22–26. This is because, under the Ninth Circuit's decision, adversarial speech between public officials and a closely-regulated business, in the normal course of regulation, constitutes a prima facie case that protected speech was a substantial or motivating factor in the public officials' decision. Then, the burden shifts to the defendant to prove that the action would have been taken, even in the absence of the protected conduct, which can only be determined by a jury. This effectively eliminates qualified immunity, which is intended to be "an immunity from suit rather than a mere defense to liability[.]" *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009). Thus, qualified immunity "is effectively lost if a case is erroneously permitted to go to trial." *Id.*

Respondent CarePartners does not take issue with the petitioners' assertion that the Ninth Circuit's decision effectively eliminates qualified immunity. Importantly, CarePartners also does not dispute the legitimacy of the fire safety regulations enforced by petitioner. Br. Opp'n 28 ("no one is disputing that the State has a substantial regulatory interest to ensure that citizens within the State of Washington who reside in boarding homes are

protected against the hazards of fire. That is simply not a matter which is within factual dispute."). Like the Ninth Circuit decision, they ignore the need to accommodate the interest represented by the regulatory requirements.

CarePartners makes two points. First, CarePartners argues that this case primarily presents a factual question that is inappropriate for this Court's review. Br. Opp'n 24. However, there is no dispute about the key facts—that the basis for concluding that there was a prima facie case was vague animosity arising because of speech by Mr. Kilkelly in the normal course of regulating boarding homes. According to CarePartners,

> "the only arguably negative interaction [Mr. Kilkelly] had with [the Department of Social and Health Services] in the past was the fact that he had taken issues to an administrative hearing, and had made an unsuccessful effort to lobby [the Department] and elected officials on the issue of receiving an exemption for [the Maple Creek facility]." Br. Opp'n 15.

There is nothing unusual about a closely-regulated business appealing an administrative decision or unsuccessfully seeking an exemption from regulation. Even the evidence, viewed in the light most favorable to CarePartners—that Mr. Kilkelly was "known" to the agency and that an administrator was "losing patience" with him (Br. Opp'n 15), does not fall outside the normal regulatory relationship. Some tension between a regulatory agency and a regulated entity is to be

expected.[1] But CarePartners' argument, accepted by the Ninth Circuit (Pet. 20a–21a), is that this normal interaction between public officials and a regulated entity constitutes a prima facie case of a retaliatory motive, and defeats qualified immunity.

If these normal incidents of a closely-regulated relationship can avoid qualified immunity and get a retaliation claim to a jury, then a specter this Court has repeatedly recognized will be realized. "[T]here is the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties." *Crawford-El v. Britton*, 523 U.S. 574, 590 n.12 (1998) (internal quotation marks omitted); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *Wilkie v. Robbins*, 127 S. Ct. 2588, 2605 (2007). The safety of vulnerable citizens in the State

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[1] The existence of some controversy, or even arguable animosity, does not alter the typicality of the facts. *Blue v. Koren*, 72 F.3d 1075, 1084–85 (2d Cir. 1995) ("Nursing homes are a highly regulated industry, and some tension between operators of homes and regulators is to be expected, as are occasional adversary proceedings. We do not believe that a showing that a rigorous inspection followed a nursing home's victory in an administrative proceeding is a sufficiently particularized showing of improper motive. While such a temporal sequence may fuel a nursing home operator's suspicions, it does not suffice to satisfy the heightened evidentiary standard. Damage actions have collateral effects upon regulators that may impact negatively upon the beneficiaries of the regulation, here some of our most helpless citizens. If a defeat in an administrative proceeding were to be the basis for a damage action brought because of unrelated and otherwise lawful regulatory actions—here mandatory inspections—the regulatory scheme might well be undermined.").

of Washington will be compromised. This is an important issue that requires review by this Court.

CarePartners' second argument is that petitioners can overcome its prima facie case at trial. Br. Opp'n 28. This argument misses the point. Qualified immunity "is effectively lost if a case is erroneously permitted to go to trial." *Pearson*, 129 S. Ct. at 815.

2. The Law Was Not Clearly Established Whether CarePartners Was Required To Plead And Show An Absence Of Probable Cause

In *Pearson*, the Court explained that *Saucier v. Katz*, 533 U.S. 194 (2001), "mandated a two-step sequence for resolving government officials' qualified immunity claims. First, a court must decide whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right." *Pearson*, 129 S. Ct. at 815–16. "Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* at 816. *Pearson* held that "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory." *Id.* at 818.

In this case, petitioners should have received qualified immunity because, in 2003, when the events took place, it was not clearly established whether the existence of probable cause negated a First Amendment retaliatory enforcement claim against a person who took or sought a criminal or regulatory prosecution. Pet. 33–38.

The Ninth Circuit (Pet. 21a) and CarePartners rely on *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989). According to CarePartners, *Soranno's Gasco* and other cases stand for the proposition that "government officials cannot retaliate against citizens for speaking out based on their assertion of First Amendment rights[.]" Br. Opp'n 27. However, both the Ninth Circuit's and CarePartners' reliance on *Soranno's Gasco* is too simplistic. The petition explained that in 2003 there was a conflict in the circuits about whether a plaintiff in a First Amendment retaliation claim must plead and show an absence of probable cause to make a prima facie case. Pet. 36–37.

The Ninth Circuit was required to consider this in its qualified immunity analysis. For example, in *Skoog v. County of Clackamas*, 469 F.3d 1221, 1234 (9th Cir. 2006), the court held that the plaintiff was not required to plead and show probable cause in his retaliation claim. But, that was not the end of the matter. The court granted qualified immunity because the law on this point was not clearly established. According to the court, it "decided only today that a right exists to be free of police action for which retaliation is a but-for cause even if probable cause exists for that action." *Skoog*, 469 F.3d at 1235. However, having established this principle, the court acknowledged that "[a]t the time [the defendant] acted, however, the law was far from clear." *Id.* Thus, "even assuming [the defendant's] primary motivation for seizing [the plaintiff's] still camera was to retaliate for [the plaintiff's] exercise of his First Amendment rights, he violated no clearly established law because probable cause existed for

the search." *Id.* The court concluded that the defendant was "entitled to qualified immunity under the second prong of our qualified immunity analysis." *Id.*

Similarly, in this case, petitioners are entitled to qualified immunity because the law, with regard to the need to plead and show an absence of probable cause, was not clearly established in 2003.[2]

3. The Decision Below That The Probable Cause Standard From *Hartman* Does Not Apply Conflicts With Decisions Of The Sixth And Eighth Circuits

The petition argued that the decision below conflicts with decisions of the Sixth and Eighth Circuits because the Ninth Circuit limited the requirement in *Hartman v. Moore*, 547 U.S. 250 (2006), that a plaintiff plead and prove probable cause, to retaliatory prosecution.[3] Pet. 30–33. CarePartners attempts to reconcile these decisions, but the fact remains that the Ninth Circuit limits *Hartman* to retaliatory prosecution, and the Sixth

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[2] In *Soranno's Gasco* the Ninth Circuit did not decide whether the speech opposing regulatory action should be protected under the First Amendment, because that issue had been conceded by the defendants. Accordingly, that case did not establish any law on that issue.

[3] CarePartners argues that the Court should not grant the writ because the petitioners did not argue *Hartman* in the district court. Br. Opp'n 29. Contrary to CarePartners' claim, this fact is not dispositive. The Court has jurisdiction over this case under 28 U.S.C. § 1254(1), even though the issue was not raised in the district court. The Ninth Circuit considered and decided the issue in the decision below. Pet. 17a n.7.

and Eighth Circuits do not. *Barnes v. Wright*, 449 F.3d 709, 720 (6th Cir. 2006) (applied *Hartman* to grand jury action initiated by conservation officers because "in its analysis, *Hartman* appears to acknowledge that its rule sweeps broadly"); *Cross v. Mokwa*, 547 F.3d 890, 896–97 (8th Cir. 2008) ("there was probable cause to enforce the housing ordinance, the plaintiffs could not succeed on a claim of selective enforcement under the First Amendment with respect to proper code enforcement actions") (internal quotation marks omitted).

It is logical to extend the probable cause requirement beyond retaliatory criminal prosecution. This Court has recognized that, in the context of prosecutorial immunity, "agency officials performing certain functions analogous to those of a prosecutor should be able to claim absolute immunity with respect to such acts." *Butz v. Economou*, 438 U.S. 478, 515 (1978). This is because the "decision to initiate administrative proceedings against an individual or corporation is very much like the prosecutor's decision to initiate or move forward with a criminal prosecution." *Id.* And, in the administrative arena "there is a serious danger that the decision to authorize proceedings will provoke a retaliatory response. An individual targeted by an administrative proceeding will react angrily and may seek vengeance in the courts." *Id.*

CarePartners also argues that there is no material conflict among the circuits, asserting that the circuits agree on the need for probable cause to bridge the gap between the nonprosecuting government agent who instigates the prosecution and the prosecutor who makes the decision to

prosecute. Br. Opp'n 29–30. This is overly simplistic, as the issue is more broadly whether *Hartman's* probable cause requirement applies when the context does not involve an intervening criminal prosecutor. Pet. 30–32; *Williams v. City of Carl Junction, Missouri*, 480 F.3d 871, 876 (8th Cir. 2007) ("*Hartman* is broad enough to apply even where the intervening actions by a prosecutor are not present").

At any rate, this case involves a complex causal situation akin to that addressed by *Hartman*. The petitioners are employees of both the Department of Social and Health Services (DSHS), which regulates boarding homes, and the State Fire Marshal, which is responsible for fire safety. Both addressed regulations under their own purview, and conducted inspections for their purposes. DSHS employees determined whether the residents were ambulatory, and the Fire Marshal determined compliance with fire safety standards. Based on information from both, DSHS imposed conditions on the Alderwood license.

CarePartners claims this was to retaliate because Mr. Kilkelly appealed a civil penalty imposed by DSHS and sought an exemption from DSHS boarding home requirements. However, there is no similar claim that the Fire Marshal had any similar animus against CarePartners or Mr. Kilkelly. Although a criminal prosecutor was not involved in this case, it presents the kind of complexity that justifies the probable cause requirement.

The Court should grant review to resolve the conflict between the Ninth Circuit and the Sixth and Eighth Circuits.

4. Conclusion

For the foregoing reasons, the Petition For A Writ Of Certiorari should be granted.

Respectfully submitted.

ROBERT M. MCKENNA
Attorney General

William Berggren Collins
Deputy Solicitor General
Counsel of Record

April 24, 2009

Michael P. Lynch
Senior Counsel

D. Thomas Wendel
Assistant Attorney General

1125 Washington Street SE
Olympia, WA 98504-0100
360-753-6245